Supreme Court, U.S.
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No. 93-1776

In the

Supreme Court of the United States

October Term, 1994

GORDON L. HALL, et al.,

Petitioners,

v.

VAL JOHN GREEN,

Respondent.

and

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 6, 1994

QUESTIONS PRESENTED

1. Whether the "*Feres* doctrine," derived from *Feres v. United States*, 340 U.S. 135, 146 (1950), which prevents members of the military from suing the government for injuries "aris[ing] out of or . . . in the course of activity incident to service," also bars the government from seeking reimbursement under the Federal Medical Care Recovery Act, 42 U.S.C. § 2651, et seq., for medical expenses incurred in treating a serviceman who was injured in the line-of-duty by a fellow serviceman whose negligence caused the injury.

2. Whether plaintiff Val Green's status at the time of the subject accident, as an Army reservist on inactive duty for training, bars him under the *Feres* doctrine from recovering damages from the estate of a fellow serviceman, Michael D. Coffman, for an injury arising out of an activity that was found by the Army to be within the line-of-duty.

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Petitioners Gordon L. Hall, Personal Representative of the Estate of Michael D. Coffman, and the Estate of Michael D. Coffman respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit (Ap p. *infra* 39) is reported in 8 F.3d 695 (1993). The opinion of Magistrate Judge John Jelderks for the U.S. District Court for the District of Oregon is unreported (App. *infra* 28).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was entered on February 17, 1994 (App. *infra* 51), and a timely filed petition for rehearing was denied on February 9, 1994 (App. *infra* 54). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653.

STATEMENT OF THE CASE

The U.S. Court of Appeals for the Ninth Circuit has interpreted the *Feres* doctrine as not barring the government from seeking reimbursement, pursuant to 42 U.S.C. §§ 2651-2653, from the estate of a serviceman for medical expenses it incurred in treating another serviceman, even though both servicemen were engaged in activities that were within the line-of-duty at the time of the subject accident. However, the government has asserted that any claim against it by the injured serviceman or by the estate of the other serviceman for indemnification against that claim, pursuant to 28 U.S.C. § 2679, is barred by the *Feres* doctrine.

The Ninth Circuit also held that the injured serviceman can seek damages from his fellow serviceman's estate, even though both servicemen were engaged in conduct that the Army previously determined was within the line-of-duty at the time the subject accident occurred.[1] The decision of the court below is inconsistent with the Court's prior holdings in *United States v. Johnson*, 481 U.S. 681 (1987), and *United States v. Stanley*, 483 U.S. 669 (1988).

This case arises out of an automobile accident that occurred while both Green and Coffman were on weekend inactive duty for training in the Army reserves. Coffman, the driver of the vehicle, was killed, and Green was injured in the accident. Following the accident, the Army conducted an investigation to determine the cause of the accident. The investigating officer in his official report states:

> SFC Coffman departed the U.S. Army Reserve Center at Portland Air National Guard Base at approximately 0745 on 8 July 1989. His purpose for leaving the center was to pick up training materials at SFG Val Green's residence.

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[1] AR 600-8-1 § 39-1 provides:

> Line of duty determinations are essential for protecting the interest of both the individual concerned and the U.S. Government, where service is interrupted by injury, disease, or death. A person who becomes a casualty because of his or her intentional misconduct or willful negligence can never be said to be injured, diseased, or deceased in the line of duty. Such a person stands to lose substantial benefits as a consequence of his or her actions; therefore, it is critical that the decision to categorize injury, disease, or death as not in the line of duty only be made after the deliberated and ordered procedures described in this regulation are followed.

> SFC Coffman did this with the knowledge and consent of his Detachment Operations Sergeant, MSG Steven M. Lucas.

(App. *infra* 64.)

As a result of this report, Green was held to have been acting in the line-of-duty, which means that he was eligible for both Army medical and veteran's disability benefits. Coffman, too, was originally determined to have been acting within the line-of-duty, but that finding was later deleted on review because line-of-duty determinations are not made in the case of death. Coffman's estate did receive military death benefits.

A. The Government's and Green's Claims.

Green originally filed a complaint seeking damages for personal injuries against the estate of Coffman and the personal representative of the estate arising out of an automobile accident in which an automobile driven by Coffman was struck by a co-defendant in this action. Originally plaintiff, with the government's consent, included the government's claim for reimbursement for medical expenses paid on Green's behalf as a part of his complaint. 42 U.S.C. §§ 2651-2653. After Green gave notice that he intended to make a claim against the government under the Federal Tort Claims Act based on Coffman's negligence, the government asserted that such a claim would be barred by the *Feres* doctrine. (App. *infra* 57.) The government then withdrew its consent for Green to pursue the government's claim on the basis that plaintiff's counsel had a conflict of interest. The government subsequently filed a third-party claim against defendants in this action.[1]

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[1] The government had previously been brought into the action by defendants on the basis that they were entitled to indemnification by the government under 28 U.S.C. § 2679.

B. Trial Court Proceedings.

In their answers defendants asserted that both Green's claim and the government's third-party claim were barred by the *Feres* doctrine and moved for a separate trial on that defense. The trial court considered the motion as a motion for summary judgment. Based on the record, which included the government's line-of-duty investigation, the trial court held that the accident did not occur as an "incident to service"; therefore, neither the government's nor Green's claims against the estate was barred by the *Feres* doctrine. The trial court found the primary reason that Green and Coffman had left the base was to get breakfast because there was no mess facility on base. The court found that they also may have gone to get the training materials and doughnuts for other members of the unit. (App. *infra* 30-32.)

C. The Decision on Appeal.

The Ninth Circuit affirmed. In ruling on the *Feres* doctrine defense to both the government's and Green's claims, the court stated:

> We conclude Green was not injured "incident to service" within the meaning of the *Feres* doctrine. Green was injured while off base and before he was due at morning formation. His injuries were therefore related to his military status only "in the sense that all human events depend upon what has already transpired," which is insufficient. *Brooks v. United States*, 337 U.S. 49, 52, 69 S.Ct. 918, 920, 93 L.Ed. 1200 (1949); *see also Estate of McAllister v. United States*, 942 F.2d 1473, 1479-80 (9th Cir. 1991) (question is whether injuries are related to "individual's *status* as a member of the military") (internal quotations omitted). Green's trip was also a "distinctly nonmilitary act[]," since it was not done under orders, was not intended to benefit the military, and did not occur on military property. *Lutz*, 944 F.2d at 1487 (citing

Durant v. Neneman, 884 F.2d 1350, 1354 (10th Cir. 1989)).

Green v. Hall, 8 F.3d 695, 699-700 (9th Cir. 1993) (emphasis in original).

Defendants filed a timely notice for reconsideration pointing out that the government had consistently taken the position in this case, with regards to its own liability, that both Green, on his personal injury claim, and defendants, on their indemnity claim, were barred from suing the government by the *Feres* doctrine. Although the government had taken the position that the *Feres* doctrine bars any claim against it, the government was claiming that it is not barred from asserting a claim against a serviceman's estate even though the Army had previously determined that the incident giving rise to the claim occurred in the line-of-duty. The court denied the petition for rehearing. (App. *infra* 54.)

REASONS FOR GRANTING THE PETITION

This is the only case of which defendants are aware where a court has permitted the government to sue a serviceman (or in this case his estate) for reimbursement of medical expenses paid on behalf of another serviceman who was injured while both were on duty for training purposes. 42 U.S.C. §§ 2651-2653. The court of appeals ignored the Army's own line-of-duty determination and found that Green's status at the time of the accident was not "incident to service," because his activity in riding with Coffman was "not done under orders, not intended to benefit the military, and did not occur on military property."

Whether an injury was incurred "incident to service" may be determined by considering the rationales behind the *Feres* doctrine prohibition, which were most recently considered by this Court in *Johnson*, 481 U.S. 681. The first of those rationales is the distinctively federal nature of the relationship between the government and its military personnel: "[I]t 'makes no sense to permit the fortuity of the situs of the alleged negligence to affect

the liability of the Government to [the] serviceman.'" *Id.* at 689 (citation omitted). Yet the court below held that one of the reasons the intramilitary defense did not apply is that the subject accident "did not occur on military property"--but neither did the accident in the *Johnson* case. Likewise, in applying the *Feres* doctrine to bar the plaintiff's claim in *United States v. Shearer*, 473 U.S. 52, 53 (1985), this Court noted the plaintiff's decedent, an Army private, was "off duty . . . and away from the base" when he was murdered by another soldier.

The distinctively federal nature of the relationship between the government and military personnel makes it undesirable to permit the government to bring a legal action against one serviceman for injuring another. Likewise, a serviceman should not be able to sue another serviceman for conduct that the government has determined occurred within the line-of-duty.

The line-of-duty test is more limited than the incident to service test. The issue of whether a serviceman was acting within the line-of-duty does not even arise unless his status at the time is incident to service.' If his status is such that the incident to

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' AR 600-8-1 § 39-2 provides in part:

> Line of duty investigations are conducted essentially to arrive at a determination as to whether misconduct or negligence was involved in the disease, injury, or death and, if so, to what degree. Depending on the circumstances of the case, an investigation may or may not be required to make this determination.
>
> . . . .
>
> c. Investigations can be conducted informally by the chain of command where no misconduct or negligence is indicated, or formally where an investigating officer is

(continued...)

service rule applies, the next level of inquiry is whether his conduct was somehow wrongful so as to prevent it from being within the line-of-duty. For the same reasons the Court adopted the intramilitary defense in *Feres*, it would be bad public policy to permit either the government or Green in this case to bring a claim against another serviceman for injuries that the Army had previously determined occurred in the line-of-duty.

A second independent rationale for the *Feres* doctrine is the "generous statutory disability and death benefits" available to those injured or killed within the line-of-duty. In this case Green received both medical and disability retirement benefits from the Army because he was injured while in the line-of-duty. The defendant's estate received death benefits as a result of his having been killed in the subject accident. The government in this case seeks to recover from Coffman's estate the amount it has had to pay in treating Green. To permit the government to recover under 42 U.S.C. § 2651, et seq., or Green to recover on his common law claims, would constitute a redistribution of the death benefits paid to Coffman in a manner that Congress surely never intended. 481 U.S. at 690. Neither the government nor Green should be allowed to make a claim against the estate of a serviceman who also died in the line-of-duty.

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[2](...continued)
appointed to conduct an investigation into suspected misconduct or negligence. In the following circumstances, a formal investigation must be conducted:

. . . .

(6) Death of a USAR or ARNG member while participating in authorized training or duty.

(7) Injury or death of a USAR or ARNG member while traveling to or from authorized training or duty.

The third rationale for the *Feres* doctrine is that to allow those types of claims "'would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Id.* (citation omitted). That is exactly what has already occurred in this case. The Ninth Circuit held that the *Feres* doctrine did not apply because Green was "not under orders" and his activity at the time of accident was "not intended to benefit the military." 8 F.3d at 700.

The commanding officer, Major Henderson, in a statement of Medical Examination and Duty Status, which is part of the line-of-duty investigation report, stated:

> They were either enroute to or retruning [sic] from SGT Green's residence where they were picking up training aids to utilize during scheduled SQT training. (App. *infra* 68.)

In his affidavit to the line-of-duty investigating officer Sergeant Lucas states:

> At approximately 0745 hrs that morning, SFC Coffman indicated that he was going to take SGT Green to pick up materials that he (Green) had inadvertently left at home, that were needed for classes, to be given later that morning.
>
> SFC Coffman had approval to leave the reserve center at this time as we had no official duties until the company formation at 0900 hrs. SFC Coffman was aware of the formation and the time, and indicated that they would be back in time for the formation.

(App. *infra* 66.)

Both the trial court and the Ninth Circuit have engaged in the type of second-guessing of the military authorities that this Court has repeatedly condemned. As the court reiterated in *Johnson*:

> "To accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986).

281 U.S. at 691 (brackets omitted).

The Army determined that Green and Coffman left base that morning to get Green's training materials. Whether they also stopped to get breakfast, and perhaps get doughnuts, before reporting back for morning formation as the courts below also stated is irrelevant. In determining whether Green's status at the time was incident to service so as to come within the *Feres* doctrine, the courts were bound by the Army's line-of-duty determination. If they had not gotten back by formation time it would become an issue of the military discipline.[*] That was one of the reasons for a line-of-duty investigation. The government in order to pursue its own claim now wants the courts to ignore the result of that investigation so that it can pursue a claim against Coffman's estate. Likewise, Green, who Coffman was helping by driving him to pick up his training materials, wants to sue Coffman's estate even though he has already received substantial military benefits. To do so, both he and the government have tried to impeach the line-of-duty report, which provided the basis for granting not only his military disability benefits, but also the medical care for which the government seeks to recover.

In holding that the *Feres* doctrine did not bar either Green's or the government's claims in this case, the Ninth Circuit relied upon this Court's opinion in *Brooks v. United States*, 337 U.S. 49 (1949), which was decided the year before *Feres*. In quoting from *Brooks* the Ninth Circuit omits the introductory

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[*] If they failed to return in time for the military formation, there was the possibility that they would have been disciplined. The morning formation was at 0900, and the accident occurred at approximately 0845.

phrase of a sentence. That sentence in its entirety reads: "*But we are dealing with an accident which had nothing to do with the Brooks' army careers*, injuries not caused by their service except in the sense that all human events depend upon what has already transpired." *Id.* at 52 (emphasis added). In *Brooks* there is no indication that either plaintiff was on duty at the time of the subject accident or that they were involved in any related military activity. In fact, both brothers were riding with their father in the family vehicle when it was stuck by an Army truck on a North Carolina highway. *Id.* at 50. Whatever viability *Brooks* had after *Feres* was decided, it certainly cannot be stretched to encompass the facts of this case. Nor was there any basis for the Ninth Circuit's statement that "Green's trip was also a 'distinctly nonmilitary act[],'" in view of the Army's line-of-duty determination.

Since this Court decided the *Johnson* case in 1987, both the Ninth Circuit and the Tenth Circuit have tried again to limit the application of the *Feres* doctrine. Other than *Brooks*, the court below relied upon its own opinion. *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991). In *Lutz* the court held that the *Feres* doctrine did not bar a claim by an Air Force officer who asserted both *Bivens* (*Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) and common law claims against the government because some enlisted personnel had broken into the plaintiff's office desk and taken a letter, which implied that she was engaged in a lesbian relationship. In holding that the *Feres* doctrine did not bar the claims against the individual servicemen the Ninth Circuit stated:

> Although this circuit has accepted *Feres*, albeit grudgingly, as "an ineradicable feature of our legal landscape," *Persons*, 925 F.2d at 299, we have also recognized that "even *Feres* concatenations must come to an end."

Id. at 1487.

In turn the Ninth Circuit in *Lutz*, and again in this case, relied upon the Tenth Circuit's opinion in *Durant v. Neneman*, 884 F.2d 1350 (1989), *cert. denied sub nom. Neneman v. Tassin*, 493 U.S. 1024 (1990), which in its facts is somewhat similar to this case. Although it is not noted in the *Durant* opinion, in a subsequent companion opinion the district court noted that the defendant was on his way to a military staff meeting when his vehicle struck a soldier who was on active duty and involved in a physical training exercise at the time he was killed. *Tassin v. Neneman*, 766 F. Supp. 974 (D. Kan. 1991). In *Durant* the Tenth Circuit held that the *Feres* doctrine does extend to actions involving the individual military tortfeasor. 884 F.2d at 1353 n.4. The Tenth Circuit's position appears to be at odds with this Court's holdings in *Chappell v. Wallace*, 462 U.S. 296 (1983), and *Stanley*, 483 U.S. 669. If a serviceman cannot maintain a claim against a fellow serviceman where the wrong is a violation of a constitutional right, it should follow *a fortiori* that there could be no cause of action against another serviceman for common law negligence that occurs in the line-of-duty.

When a soldier is engaged in a military activity, whether it be to drive a buddy to pick up training materials, or go to breakfast because there are no mess facilities on base, or get doughnuts for the other members of the unit who are on weekend training, he does not expect to be sued by the government for his buddy's medical expenses when the Army has determined that the accident in which they were involved occurred within the line-of-duty. If the government is permitted to bring this action, does that mean that anytime the government is required to provide medical services to a serviceman as the result of some other serviceman's negligence the government has a cause of action under 42 U.S.C. §§ 2651-2653 against the latter for its medical expenses in treating the injured serviceman? What if the serviceman from whom the government seeks recovery had accidentally shot his buddy while in combat? Or had negligently driven a jeep causing a passenger to be thrown out? Or had struck a soldier with a vehicle while the soldier was in a crosswalk on his way to the mess hall? How are these examples

legally different from this case where the Army found that Coffman and Green had gone to pick up Army training materials at Green's residence when the accident occurred. The Federal Medical Care Recovery Act does not, on its face, prevent the government from seeking reimbursement from the tortfeasor under any of those scenarios. However, why should it be against public policy for a serviceman to sue the government for service related injuries, but not the reverse? If an injury occurred while the participants were acting within the line-of-duty, the Department of Defense should not be able to pursue a claim against one of its military personnel.[1] Why should the courts be in a better position to second-guess the military when the government is a plaintiff in a Federal Medical Care Recovery Act case than when it is a defendant in a typical *Feres* doctrine case? Likewise, why should one solider be able to try to impeach in court the Army's prior finding that his injury was in the line-of-duty in order to maintain a legal action against his buddy's estate by subsequently claiming that his own status at the time of the accident was not "incident to service." He should not be able to both have his own military benefits and seek damages against his fellow soldier's estate.

This Court should make clear that the *Feres* doctrine is not only a bar to claims brought by servicemen under the Federal Tort Claims Act, but also to claims brought by the government under the Federal Medical Care Recovery Act against a serviceman for the treatment of injuries to a fellow serviceman which occurred in the line-of-duty. It should also make clear that the *Feres* doctrine bars one serviceman from suing another

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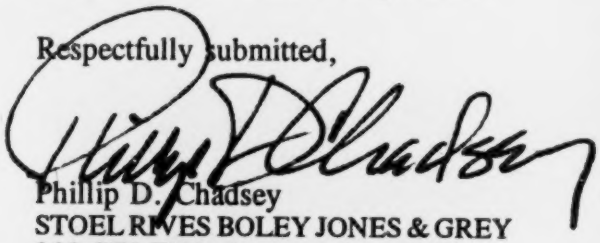
[1] 42 U.S.C. § 2651(c) specifically exempts from recovery medical services provided by the Department of Veterans Affairs "to an eligible veteran for a service-connected disability." Congress apparently did not foresee that the Department of Defense would bring an action such as the present one or it may have assumed that the Feres doctrine would preclude it. (As amended by Pub. L. No. 102-54 § 13(q)(8), 105 Stat. 281.)

serviceman or his estate where his injuries were sustained under the same circumstances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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May 6, 1994

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

VAL JOHN GREEN, Plaintiff, vs. GORDON L. HALL, PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL D. COFFMAN; THE ESTATE OF MICHAEL D. COFFMAN; RICHARD M. ROBERTSON; AND THE SALVATION ARMY, A NON-PROFIT CORPORATION, Defendants.	Case No. 9102-01275 AMENDED COMPLAINT FOR PERSONAL INJURY, REQUEST FOR JURY TRIAL (ARBITRATION NOT REQUESTED)

Plaintiff alleges:

1.

That at all times herein mentioned plaintiff was a resident of Multnomah County, State of Oregon.

2.

That at all times herein mentioned Michael D. Coffman was the operator of a white 1988 Buick Century, Oregon license plate number NXY 501 owned by Eastman Kodak Company and Dennis Hardwick. Plaintiff was a passenger in said vehicle in the right front seat.

3.

Defendant Gordon L. Hall is the duly constituted, qualified, appointed and acting representative of the Estate of Michael D. Coffman who died in the below-described automobile collision on July 8, 1989.

4.

That at all times mentioned herein The Salvation Army was and is a California non-profit corporation registered in the State of Oregon as a charitable institution. That at all times mentioned herein Richard M. Robertson was and is an agent and employee of The Salvation Army and was acting within the course and scope of his employment.

5.

That at all times mentioned herein N.E. Lombard and N.E. Martin Luther King Boulevard were and are public streets in the City of Portland, County of Multnomah, State of Oregon. That N.E. Lombard runs in a general easterly and westerly direction and N.E. Martin Luther King Boulevard runs in a northerly and southerly direction.

6.

That at approximately 0845 on July 8, 1989, Michael D. Coffman was operating his 1988 Buick in a westerly direction on and along N.E. Lombard and its intersection with N.E. Martin Luther King Boulevard, when at said time and place he so operated his vehicle so as to cause it to collide with a 198(?) GMC truck being operated by Richard M. Robertson and owned by The Salvation Army and so caused plaintiff the personal injuries set forth below.

7.

That the proximate cause of the collision and plaintiff's resulting personal injuries was the negligence of Michael D. Coffman in one or more or the following particulars:

a. In failing to stop his vehicle at a red traffic light in violation of ORS 811.260 and 811.265;

b. In failing to maintain a proper lookout;

c. In failing to maintain proper control of his vehicle;

d. In operating his vehicle at a greater speed than was reasonable and prudent under the circumstances.

8.

That the proximate cause of the collision and plaintiff's resulting personal injuries was the negligence of defendants The Salvation Army and Richard M. Coffman in one or more of the following particulars:

a. In failing to maintain a proper lookout;

b. In failing to maintain proper control of his vehicle;

c. In operating his vehicle at a greater speed than was reasonable and prudent under the circumstances.

9.

That as a direct and proximate result of the negligence of the defendants and each of them, plaintiff suffered the following injuries:

a. Fracture, left humerus;

b. Closed head, severe craniocerebral injury, with resulting global brain dysfunction;

c. Left wrist radial nerve neuropraxia; and

d. Scalp laceration.

10.

That these injuries were and still are immediately painful and disabling and have substantially interfered with his ability to carry out his usual and regular activities at work, at home, at school and elsewhere.

That as a direct and proximate result of the negligence of the defendants and each of them, plaintiff has suffered and will continue to suffer into the future physical and mental pain, anguish, discomfort, and inconvenience, disability and anxiety all to his non-economic damages in the sum of $500,000.00.

11.

That as a direct and proximate result of the negligence of the defendants and each of them, plaintiff has required the services of physicians, nurses, therapists, hospital care and medications. All of this medical care was necessary and all of the charges were reasonable. Plaintiff's total medical bills to date are approximately $40,000.00. It is anticipated that plaintiff will incur approximately $50,000.00 to $100,000.00 of additional medical care in the future.

12.

That at the time of the above described collision, plaintiff was employed part-time in the U.S. Army Reserves as a radio communications specialist at the rank of Sergeant E-5, as a part-time security guard and was attempting or planning to attend graduate school. That as a direct and proximate result of the above-described collision, plaintiff is permanently and totally disabled and will never be able to work or attend graduate school successfully and has therefore, suffered lifetime lost wages in the approximate sum of $2,421,980.00.

WHEREFORE, plaintiff prays for a judgment against defendants for non-economic damages in the sum of $500,000.00 and for economic damages in the sum of $2,561,980.00 and for his costs and disbursements incurred herein.

DATED this 9 day of May, 1991.

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Estate of Michael D. Coffman

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

VAL JOHN GREEN, Plaintiff, v. GORDON L. HALL, PERSONAL REPRESENTATIVE OF MICHAEL D. COFFMAN; THE ESTATE OF MICHAEL D. COFFMAN; RICHARD M. ROBERTSON; and THE SALVATION ARMY, A NON-PROFIT CORPORATION, Defendants.	Civil No. 91-595 FR AMENDED ANSWER OF DEFENDANTS GORDON L. HALL AND THE ESTATE OF MICHAEL D. COFFMAN TO AMEND COMPLAINT FOR PERSONAL INJURY

The defendants Gordon L. Hall, Personal Representative of the Estate of Michael D. Coffman, deceased, and the Estate of Michael D. Coffman ("answering defendants") admit, deny, and allege as follows:

1.

The answering defendants admit that Hall is the Personal Representative of the Estate of Michael D. Coffman, deceased. The answering defendants further admit that SFC Coffman was killed at approximately 0845 on July 8, 1989, while operating his 1988 Buick in a westerly direction along NE Lombard and its intersection with NE Martin Luther King Boulevard in Portland. The answering defendants also admit that the plaintiff SGT Val John Green was a passenger in SFC Coffman's automobile at the time of that accident, and that Green received some injuries.

2.

Except as admitted above, the answering defendants lack sufficient information to form a belief as to the truth or falsity of the remaining allegations contained in the plaintiff's Amended Complaint, and therefore deny those other allegations.

3.

FIRST AFFIRMATIVE DEFENSE
(28 USC § 2679)

For a First Affirmative Defense, the answering defendants allege:

A. At the time the foregoing accident occurred, both the answering defendants' decedent, SFC Michael D. Coffman, and the plaintiff, SGT Val John Green, were members of the United States Army Reserve on Inactive Duty Training. SFC Coffman was operating his vehicle within the line of duty and within the scope of his employment by the Army for the purpose of assisting the plaintiff in picking up Army training materials, at the time the accident occurred. Plaintiff was injured while serving in the line of duty.

B. Therefore, all recourse for any claim against Coffman's estate must be against their common employer, the United States Government.

4.

SECOND AFFIRMATIVE DEFENSE
(Intramilitary Immunity)

For a Second Affirmative Defense, the answering defendants allege:

A. The answering defendants reallege paragraph A of their First Affirmative Defense.

B. Plaintiff's injuries arose out of or in the course of activity incident to his service in the military.

C. Therefore, plaintiff is precluded from any action against the answering defendants for those injuries.

WHEREFORE, the answering defendants, having fully answered the plaintiff's Amended Complaint, pray that they be dismissed as to these parties, with costs and attorneys' fees, pursuant to FRCP 11, for having brought a claim that is barred by law.

DATED July 3, 1991.

Phillip D. Chadsey, OSB No. 66028
Tracy J. White, OSB No. 90412
Of Attorneys for Defendants
Gordon L. Hall and the Estate
of Michael D. Coffman

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing AMENDED ANSWER OF DEFENDANTS HALL AND THE ESTATE OF MICHAEL D. COFFMAN TO AMENDED COMPLAINT FOR PERSONAL INJURY by mail on July 3, 1991, on the following:

Thomas J. Flaherty
McClure, Schwab & Flaherty
9250 SW Tigard Ave.
Tigard, OR 97223
Attorneys for Plaintiff

Terry M. Weiner
Mitchell, Lang & Smith
2000 One Main Place
101 SW Main Street
Portland, OR 97204
Attorneys for Defendants Robertson and the Salvation Army

DATED: July 3, 1991.

Phillip D. Chadsey, OSB No. 66028
Tracy J. White, OSB No. 90412
Of Attorneys for Defendants
Gordon L. Hall and the Estate
of Michael D. Coffman

Phillip D. Chadsey, OSB No. 66028
Tracy J. White, OSB No. 90412
STOEL RIVES BOLEY JONES & GREY
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268
Telephone: (503) 224-3380
Of Attorneys for Defendants
Gordon L. Hall and the
Estate of Michael D. Coffman

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

VAL JOHN GREEN, Plaintiff, v. GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman; THE ESTATE OF MICHAEL D. COFFMAN; RICHARD M. ROBERTSON; and THE SALVATION ARMY, a non-profit corporation, Defendants; GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman; THE ESTATE OF MICHAEL D. COFFMAN Third-Party Plaintiffs, v.	Civil No. 91-595 JE DEFENDANTS GORDON L. HALL AND THE ESTATE OF MICHAEL D. COFFMAN'S AMENDED CROSS-CLAIM AND ANSWER TO CROSS-CLAIM

UNITED STATES OF AMERICA,

Third-Party Defendant.

Defendants Gordon L. Hall and the Estate of Michael D. Coffman ("answering defendants") answer the Cross-Claim of defendants Richard M. Robertson and The Salvation Army as follows:

1.

Answering defendants deny all of the allegations contained in the Cross-Claim of defendants Richard M. Robertson and The Salvation Army.

CROSS-CLAIM

For its Cross-Claim against defendants Richard M. Robertson and The Salvation Army, answering defendants allege as follows:

2.

Plaintiff's injuries, if any, were contributed to by the negligence of Richard M. Robertson, an agent and employee of The Salvation Army, acting within the course and scope of his employment, in one or more of the following particulars:

a. In failing to maintain a proper lookout;

b. In failing to maintain proper control of his vehicle; and

c. In operating his vehicle at a speed that was greater than prudent under the circumstances.

3.

If answering defendants are found liable to plaintiff, then answering defendants are entitled to contribution from defendants Richard M. Robertson and The Salvation Army.

WHEREFORE, defendants Gordon L. Hall and the Estate of Michael D. Coffman pray that the Cross-Claim of defendants Richard M. Robertson and The Salvation Army be dismissed and that they take nothing thereby; that the answering defendants

receive judgment against defendants Richard M. Robertson and The Salvation Army on their Cross-claim; and that the answering defendants be awarded their costs and disbursements incurred herein.

Dated: July 17, 1991.

Phillip D. Chadsey, OSB No. 66028
Tracy J. White, OSB No. 90412
Of Attorneys for Defendants
Gordon L. Hall and the Estate
of Michael D. Coffman

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 1991, I served copies of the attached DEFENDANTS GORDON L. HALL AND THE ESTATE OF MICHAEL D. COFFMAN'S AMENDED CROSS-CLAIM AND ANSWER TO CROSS-CLAIM by arranging for their hand delivery this same day to the following:

Thomas J. Flaherty Attorney at Law One Lincoln Center Suite 490 10300 SW Greenburg Road Portland, OR 97223	Attorneys for Plaintiff
Terry M. Weiner Mitchell, Lang & Smith Attorneys at Law 2000 One Main Place 101 SW Main Street Portland, OR 97204	Attorneys for Defendants Richard M. Robertson and The Salvation Army
Charles H. Turner United States Attorney for The District of Oregon Suite 1000 888 SW Fifth Avenue Portland, OR 97204	Attorneys for Third-Party Defendant United States of America

and by mail to the following:

Hon. Dick Thornburgh U.S. Attorney General Room 5111 Main Justice Building 10th St. & Constitution Ave. Washington, DC 20530	Attorneys for Third-Party Defendant United States of America

Phillip D. Chadsey, OSB No. 66028
Tracy J. White, OSB No. 90412
Of Attorneys for Defendants
Gordon L. Hall and the Estate
of Michael D. Coffman

CHARLES H. TURNER
United States Attorney
District of Oregon
OSB # 66127
WILLIAM W. YOUNGMAN
Assistant United States Attorney
888 S.W. Fifth Ave., Suite 1000
Portland, Oregon 9720-2024
(503) 727-1000
OSB # 71192

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

VAL JOHN GREEN, Plaintiff, v. GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman; THE ESTATE OF MICHAEL D. COFFMAN; RICHARD M. ROBERTSON; and THE SALVATION ARMY, a non-profit corporation, Defendants,	Civil No. 91-595 JE THIRD-PARTY DEFENDANT UNITED STATES OF AMERICA'S ANSWER TO DEFENDANTS/ THIRD PARTY PLAINTIFFS GORDON L. HALL'S AND ESTATE OF MICHAEL D. COFFMAN'S THIRD-PARTY COMPLAINT

GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman; THE ESTATE OF MICHAEL D. COFFMAN,

Third-Party Plaintiffs,

v.

UNITED STATES OF AMERICA,

Third-Party Defendant.

Third-party defendant, United States of America, answers each separately numbered paragraph of defendants'/third-party plaintiffs' third-party complaint as follows:

1. Admits.
2. Denies.
3. Admits.
4. Denies.

FOR A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE, third-party defendant alleges:

1. The third-party complaint fails to state a claim upon which relief can be granted.

2. At all times material, Michael D. Coffman was not acting within the scope of his employment by third-party defendant, United States of America.

3. Defendants'/third-party plaintiffs' claim against third-party defendant, United States of America, is jurisdictionally barred by the "Feres Doctrine". *See*, *Feres v. United States*, 340 U.S. 135 (1950); *Stencel Aero Engineering Corp. v. United States*, 421 U.S. 666 (1977).

4. Defendants'/third-party plaintiffs' third-party complaint is an unconsented suit against the United States.

WHEREFORE, having fully answered defendants'/third-party plaintiffs' third-party complaint, third-party defendant prays that the same be dismissed, that defendants/third-party plaintiffs take nothing thereby, and that third-party defendant recover its costs herein.

DATED this 9th day of September, 1991

CHARLES H. TURNER
United States Attorney

WILLIAM W. YOUNGMAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing THIRD-PARTY DEFENDANT UNITED STATES OF AMERICA'S ANSWER TO DEFENDANTS/THIRD-PARTY PLAINTIFFS GORDON L. HALL'S AND ESTATE OF MICHAEL D. COFFMAN'S THIRD-PARTY COMPLAINT, on the parties herein by causing to be deposited in the United States mail at Portland, Oregon, on the 9th day of September, 1991, a true copy thereof, enclosed in an envelope with postage thereon prepaid, addressed to:

Thomas J. Flaherty — Attorneys for Plaintiff
Attorney at Law
One Lincoln Center
10300 S.W. Greenburg Road, Suite 490
Portland, Oregon 97223

Phillip D. Chadsey — Attorneys for Defendants/
STOEL RIVES BOLEY — Third-Party Plaintiffs:
JONES & GREY — Gordon L. Hall and the
900 S.W. Fifth Ave, Ste 2300 — Estate of Michael D.
Portland, Oregon 97204-1268 — Coffman

Terry M. Weiner — Attorneys for Defendants
MITCHELL, LANG & SMITH — Richard M. Robertson
Attorneys at Law — and The Salvation Army
2000 one Main Place
101 SW Main Street
Portland, OR 97204

WILLIAM W. YOUNGMAN
Assistant U.S. Attorney

Phillip D. Chadsey, OSB No. 66028
Tracy J. White, OSB No. 90412
STOEL RIVES BOLEY JONES & GREY
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268
Telephone: (503) 224-3380
Of Attorneys for Defendants
Gordon L. Hall and the
Estate of Michael D. Coffman

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

VAL JOHN GREEN, Plaintiff, v. GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman; THE ESTATE OF MICHAEL D. COFFMAN; RICHARD M. ROBERTSON; AND THE SALVATION ARMY, a non-profit corporation, Defendants.	Civil No. 91-595 FR ANSWER OF DEFENDANTS GORDON L. HALL AND THE ESTATE OF MICHAEL D. COFFMAN TO COMPLAINT OF THIRD-PARTY PLAINTIFF UNITED STATES OF AMERICA **DEMAND FOR JURY TRIAL**

GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman, and THE ESTATE OF MICHAEL D. COFFMAN

Third-Party Plaintiffs,

v.

UNITED STATES OF AMERICA,

Third-Party Defendant Third-Party Plaintiff.

Defendants/third-party plaintiff Gordon L. Hall ("Hall"), personal representative of the Estate of Michael D. Coffman, deceased, and the Estate of Michael D. Coffman ("Coffman Estate") admit, deny, and allege as follows:

1.

The Coffman Estate admits that Hall is the personal representative of the Estate of Michael D. Coffman, deceased. It further admits that SFC Michael D. Coffman ("SFC Coffman") was killed at approximately 0845 on July 8, 1989, while operating his 1988 Buick in a westerly direction along NE Lombard and its intersection with NE Martin Luther King Boulevard in Portland. The Coffman Estate also admits that plaintiff SGT Val John Green ("SGT Green") was a passenger in SFC Coffman's automobile at the time of that accident and that SGT Green received some injuries.

2.

Except as admitted above, the Coffman Estate lacks sufficient information to form a belief as to the truth or falsity of the remaining allegations contained in the Complaint of Third-

Party Plaintiff United States of America and therefore denies those other allegations.

3.

FIRST AFFIRMATIVE DEFENSE

(Intra-military Immunity)

For a First Affirmative Defense, the answering defendants allege:

A. At the time the foregoing accident occurred, both decedent, SFC Coffman, and plaintiff, SGT Green, were members of the United States Army Reserve on inactive duty training. SFC Coffman was operating his vehicle within the line of duty for the purpose of assisting plaintiff in picking up Army training materials at the time the accident occurred.

B. The government's claim against the Coffman Estate is barred by public policy because at all times mentioned herein both SFC Coffman and SGT Green were engaged in military duties and SGT Green's injuries occurred as an incident to military service.

4.

SECOND AFFIRMATIVE DEFENSE

(Third-Party Defendant/Plaintiff is a Volunteer)

For a second affirmative defense, the Coffman Estate alleges that if SGT Green was not injured within the line of duty, the government had no obligation for the payment of SGT Green's medical expenses; therefore, it acted as a volunteer and is not entitled to indemnification from the Coffman Estate.

Wherefore, the answering defendants pray that the government's Third-Party Complaint be dismissed.

Dated: June 17, 1992.

Phillip D. Chadsey, OSB No. 66028
Tracy J. White, OSB No. 90412
Of Attorneys for Defendants
Gordon L. Hall and the Estate
of Michael D. Coffman

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 1992, I served copies of the attached DEFENDANTS GORDON L. HALL'S AND THE ESTATE OF MICHAEL D. COFFMAN'S REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A SEPARATE TRIAL by mailing them this same day to the following:

Thomas J. Flaherty Attorney at Law One Lincoln Center Suite 490 10300 SW Greenburg Road Portland, OR 97223	Attorneys for Plaintiff
Terry M. Weiner Mitchell, Lang & Smith Attorneys at Law 2000 One Main Place 101 SW Main Street Portland, OR 97204	Attorneys for Defendants Richard M. Robertson and The Salvation Army
Charles H. Turner United States Attorney for the District of Oregon Suite 1000 888 SW Fifth Avenue Portland, OR 97204	Attorneys for Third-Party Defendant United States of America
Hon. William P. Barr U.S. Attorney General Room 5111 Main Justice Building 10th St. & Constitution Ave. Washington, DC 20530	Attorneys for Third-Party Defendant United States of America

Phillip D. Chadsey, OSB No. 66028
Tracy J. White, OSB No. 90412
Of Attorneys for Defendants
Gordon L. Hall and the Estate
of Michael D. Coffman

CHARLES H. TURNER
United States Attorney
District of Oregon
OSB # 66127
WILLIAM W. YOUNGMAN
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(503) 727-1000
OSB # 71192
of Attorneys for Third-Party Defendant, and
Third-Party Plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

VAL JOHN GREEN, Plaintiff, v. GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman; THE ESTATE OF MICHAEL D. COFFMAN; RICHARD M. ROBERTSON; and THE SALVATION ARMY, a non-profit corporation, Defendants, GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman, THE ESTATE OF MICHAEL D. COFFMAN	Civil No. 91-595 JE COMPLAINT OF THIRD-PARTY PLAINTIFF UNITED STATES OF AMERICA

Third-Party Plaintiffs,

v.

UNITED STATES OF AMERICA,

Third-Party Defendant, and Third-Party Plaintiff.

Third-party plaintiff United States of America alleges:

I.

Paragraphs 1 through 7, and 9 through 12 of plaintiff Val John Green's Amended Complaint For Personal Injury, dated May 9, 1991, are attached hereto and incorporated herein as Exhibit A.

II.

As a result of said injuries suffered by plaintiff Val John Green, he has received medical and hospital care and treatment furnished by the United States of America under the provisions of Title 42 U.S.C. Sections 2651-2653. The cost of such medical and hospital care and treatment is $37,389.64.

WHEREFORE, third-party plaintiff United States of America prays for a judgment against defendants in the sum of $37,389.64, and for costs and disbursements incurred herein.

Dated this 10th day of June, 1992.

Respectfully submitted,
CHARLES H. TURNER
United States Attorney

William W. Youngman
Assistant United States Attorney

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

VAL JOHN GREEN, Plaintiff, vs. GORDON L. HALL, PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL D. COFFMAN; THE ESTATE OF MICHAEL D. COFFMAN; RICHARD M. ROBERTSON; AND THE SALVATION ARMY, A NON-PROFIT CORPORATION, Defendants.	Case No. 9102-01275 AMENDED COMPLAINT FOR PERSONAL INJURY, REQUEST FOR JURY TRIAL (ARBITRATION NOT REQUESTED)

Plaintiff alleges:

1.

That at all times herein mentioned plaintiff was a resident of Multnomah County, State of Oregon.

2.

That at all times herein mentioned Michael D. Coffman was the operator of a white 1988 Buick Century, Oregon license plate number NXY 501 owned by Eastman Kodak Company and Dennis Hardwick. Plaintiff was a passenger in said vehicle in the right front seat.

3.

Defendant Gordon L. Hall is the duly constituted, qualified, appointed and acting representative of the Estate of Michael D. Coffman who died in the below-described automobile collision on July 8, 1989.

4.

That at all times mentioned herein The Salvation Army was and is a California non-profit corporation registered in the State of Oregon as a charitable institution. That at all times mentioned herein Richard M. Robertson was and is an agent and employee of The Salvation Army and was acting within the course and scope of his employment.

5.

That at all times mentioned herein N.E. Lombard and N.E. Martin Luther King Boulevard were and are public streets in the City of Portland, County of Multnomah, State of Oregon. That N.E. Lombard runs in a general easterly and westerly direction and N.E. Martin Luther King Boulevard runs in a northerly and southerly direction.

6.

That at approximately 0845 on July 8, 1989, Michael D. Coffman was operating his 1988 Buick in a westerly direction on and along N.E. Lombard and its intersection with N.E. Martin Luther King Boulevard, when at said time and place he so operated his vehicle so as to cause it to collide with a 198(?) GMC truck being operated by Richard M. Robertson and owned by The Salvation Army and so caused plaintiff the personal injuries set forth below.

7.

That the proximate cause of the collision and plaintiff's resulting personal injuries was the negligence of Michael D. Coffman in one or more or the following particulars:

a. In failing to stop his vehicle at a red traffic light in violation of ORS 811.260 and 811.265;

b. In failing to maintain a proper lookout;

c. In failing to maintain proper control of his vehicle;

d. In operating his vehicle at a greater speed than was reasonable and prudent under the circumstances.

8.

That the proximate cause of the collision and plaintiff's resulting personal injuries was the negligence of defendants The Salvation Army and Richard M. Coffman in one or more of the following particulars:

a. In failing to maintain a proper lookout;

b. In failing to maintain proper control of his vehicle;

c. In operating his vehicle at a greater speed than was reasonable and prudent under the circumstances.

9.

That as a direct and proximate result of the negligence of the defendants and each of them, plaintiff suffered the following injuries:

a. Fracture, left humerus;

b. Closed head, severe craniocerebral injury, with resulting global brain dysfunction;

c. Left wrist radial nerve neuropraxia; and

d. Scalp laceration.

10.

That these injuries were and still are immediately painful and disabling and have substantially interfered with his ability to carry out his usual and regular activities at work, at home, at school and elsewhere.

That as a direct and proximate result of the negligence of the defendants and each of them, plaintiff has suffered and will continue to suffer into the future physical and mental pain, anguish, discomfort, and inconvenience, disability and anxiety all to his non-economic damages in the sum of $500,000.00.

11.

That as a direct and proximate result of the negligence of the defendants and each of them, plaintiff has required the services of physicians, nurses, therapists, hospital care and medications. All of this medical care was necessary and all of the charges were reasonable. Plaintiff's total medical bills to date are approximately

$40,000.00. It is anticipated that plaintiff will incur approximately $50,000.00 to $100,000.00 of additional medical care in the future.

12.

That at the time of the above described collision, plaintiff was employed part-time in the U.S. Army Reserves as a radio communications specialist at the rank of Sergeant E-5, as a part-time security guard and was attempting or planning to attend graduate school. That as a direct and proximate result of the above-described collision, plaintiff is permanently and totally disabled and will never be able to work or attend graduate school successfully and has therefore, suffered lifetime lost wages in the approximate sum of $2,421,980.00.

WHEREFORE, plaintiff prays for a judgment against defendants for non-economic damages in the sum of $500,000.00 and for economic damages in the sum of $2,561,980.00 and for his costs and disbursements incurred herein.

DATED this 9 day of May, 1991.

Thomas J. Flaherty, OSB #74096
Of Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

VAL JOHN GREEN, Plaintiff, v. GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman; THE ESTATE OF MICHAEL D. COFFMAN; RICHARD M. ROBERTSON; and THE SALVATION ARMY, a non-profit corporation, Defendants;	)	Civil No. 91-595 JE OPINION
GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman; THE ESTATE OF MICHAEL D. COFFMAN Third-Party Plaintiffs, v. UNITED STATES OF AMERICA,	)	

Third-Party Defendant/
Third-Party Plaintiff.

Thomas J. Flaherty
One Lincoln Center, Suite 490
10300 S.W. Greenburg Road
Portland, OR 97223
Attorneys for Plaintiff

Terry M. Weiner
Mitchell, Lang & Smith
2000 One Main Place
102 S.W. Main Street
Portland, OR 97204
Attorneys for Defendants Richard M. Robertson and The Salvation Army

Phillip D. Chadsey
Stoel Rives Boley Jones & Grey
900 S.W. Fifth Avenue, Suite 2300
Portland, OR 97204-1269
Attorney for Defendants/Third-Party Plaintiffs Gordon L. Hall and Estate of Michael D. Coffman

Charles H. Turner
United States Attorney
William W. Youngman
Assistant United States Attorney
888 S.W. Fifth Avenue, Suite 1000
Portland, OR 97204
Attorneys for Third-Party Defendant/Third-Party Plaintiff United States of America

JELDERKS, Magistrate Judge:

Plaintiff Val Green brings this action against the estate of Michael Coffman and its personal representative, Gordon Hall (collectively "the estate") seeking to recover for damages incurred in an automobile accident. The United States, as a third-party plaintiff, seeks to recover from the estate the costs of medical and hospital care and treatment furnished by the United States. The parties have agreed that I should decide the issues raised by the estate's motions for separate trial on its affirmative defenses of intramilitary immunity according to the standards for summary judgment. Having reviewed the parties' arguments and the record submitted earlier and subsequently supplemented, I grant summary judgment for plaintiff and the United States as to the intramilitary immunity defense.

BACKGROUND

Plaintiff Green and decedent Coffman were both sergeants in the United States Army Reserve assigned to a Special Forces Group in Portland, Oregon. On the evening of Friday, July 7, 1989, they went to the Portland Air Base for a weekend of inactive duty training. They left the base on a training exercise and returned to the base at approximately 3:00 a.m. the following morning, Saturday, July 8, 1989. They and the rest of their company were then allowed either to leave or remain on the base until the first

formation at 9:00 or 9:30 a.m.[1] Green and Coffman chose to remain on the base.

Though it is impossible to reconstruct their movements or intentions that morning with confidence, it appears that the two awoke between 6:00 a.m. and 6:30 a.m. Green, Coffman, and Sergeant McMahan, another member of the same company, left the base at approximately 7:00 a.m. According to McMahan's affidavit, the three decided to leave the base to eat breakfast, preferring to eat at a restaurant rather than eat the "meals ready to eat" provided to those who stayed. McMahan added that Green and Coffman told him that they had to go to Green's house to pick up some unspecified training materials to be used later that day. McMahan also said that he, Green, and Coffman agreed to bring back donuts for team members who stayed on the base. McMahan left the base in his own vehicle a few minutes after Green and Coffman had left together. After failing to find Green and Coffman, he ate alone and returned to the base.

There is some evidence that Green and Coffman returned to the base and left again.[2] Master Sergeant Steven Lucas, also a

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[1] Green has no memory of the events occurring on Saturday after his company returned to the base. The Saturday training schedule indicates that the first formation was to take place at 9:30 a.m., and the testimony of several witnesses supports the conclusion that was the time of the first formation. Other witnesses recalled that the first formation was scheduled for 9:00. Though this discrepancy is of some interest in attempting to determine the movements and intentions of Green and Coffman that morning, the 30-minute difference is not critical in determining the proper disposition of the estate's intramilitary immunity defense.

[2] As with the discrepancy in time of the first formation noted above, whether or not Green and Coffman returned to the

(continued...)

member of the Special Forces Group, stated in his affidavit that he saw the two leaving the team room between 8:30 and 8:40 a.m. At any rate, it is clear that the two left the base in a 1988 Buick driven by Coffman, and owned by Eastman Kodak Company, Coffman's employer. At approximately 8:45 a.m., that automobile collided with a truck owned by the Salvation Army at the intersection of N.E. Lombard and N.E. Martin Luther King Boulevard. Coffman's vehicle was westbound, headed away from the base, and not on the most direct path to Green's residence at 2915 S.E. 35th Place, at the time of the collision. Coffman died, and Green suffered serious injuries. Neither donuts nor training notes or other service-related materials or equipment were found in Coffman's automobile.

Green lived with Larry Gibson and John Boyce, who were both members of his company. According to his affidavit, Gibson returned to his residence after being dismissed early Saturday morning, at approximately 8:30 a.m. left to return to the base. Gibson noted that Green's training materials were still on a table in the house when he left.

Green brought this action in the Multnomah County Circuit Court against Coffman's estate, the estate's personal representative, the Salvation Army, and Richard Robertson, driver of the Salvation Army truck. Based on the assertion that Coffman was acting under color of his status as a member of the armed forces of the United States at the time of the accident, the estate removed the action to federal court under 28 U.S.C. § 1442(a). The estate tendered defense of the action to the United States pursuant to 28 U.S.C. § 2679, and subsequently brought a third-party action against the United States alleging that Coffman was

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'(...continued)
base and left again is not of critical importance in deciding the issue before the court.

acting within the scope of his army employment at the time of the accident. That complaint asserts that the government must pay for the estate's defense, and indemnify the estate for any award secured against it by Green or other codefendants. The government subsequently was allowed to bring a third-party action against the estate asserting the right to recover the costs of medical care furnished Green under the provisions of 42 U.S.C. § 2651-2653.

Green moved to remand the case to state court. On July 29, 1991, I stayed this case pending the United States Attorney General's decision whether to certify, pursuant to 28 U.S.C. § 2679(d)(2), that Coffman was acting within the scope of his employment at the time of the accident. On September 26, 1991, the Attorney General denied certification, concluding that it appeared that Coffman was not acting within the scope of his government employment at the time of the accident. The estate then moved this court, pursuant to 28 U.S.C. § 2679(d)(3), for certification that Coffman was acting within the scope of his employment. The parties submitted voluminous records and documents in support of and opposition to the estate's motion to certify.

Through a Finding and Recommendation issued on January 18, 1992, and adopted by the Honorable Helen Frye on February 13, 1992, the estate's motion for certification was denied. My recommendation that the motion for certification be denied was based on my conclusion that Coffman's destination and motivation at the time of the accident could not be determined, and that a conclusion that Coffman and Green were on their way to retrieve Green's notes when the accident occurred was no more plausible than a number of other conclusions. *Green v. Hall*, No. 91-595, Findings and Recommendations at 10 (D. Or. Jan. 18, 1992). I also noted that, even if Coffman had been driving to retrieve Green's notes at the time of the accident, he probably would have

been acting outside the scope of his service-related employment. *Id.* at 11.

The estate subsequently appealed denial of its motion for certification, and moved for a separate trial of the issues raised in their affirmative defense of an intramilitary immunity derived from *Feres v. United States*, 340 U.S. 135 (1950), and later related cases. At a hearing held on September 1, 1992, I concluded that I should resolve the applicability of the *Feres* doctrine to this action based on the record submitted earlier on the certification issue and any supplemental material the parties wished to submit. During a telephone conference held on September 2, 1992, the parties agreed that the motions for a separate trial should be construed as a motion for summary judgment on the issues raised in the estate's affirmative intramilitary defenses. The parties also agreed that my decision would not be subject to appeal at the district court level, but should instead be available for consideration, should the Ninth Circuit so choose, in conjunction with the estate's appeal of the certification issue.

STANDARDS FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party may discharge this burden by showing that there is an absence of evidence to support the nonmoving party's case. *Id.* When the moving party shows the absence of an issue of material fact, the nonmoving party must go beyond the pleadings and show that there is a genuine issue for trial. *Id.* at 324.

The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Reasonable doubts concerning the existence of a factual issue

should be resolved against the moving party. *Id.* at 630-31. The evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in the nonmoving party's favor. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 255 (1985). No genuine issue for trial exists, however, where the record as a whole could not lead the trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

DISCUSSION

In its answers to plaintiff's complaint and to the government's third-party complaint, the estate asserts an "intramilitary immunity" defense based on *Feres v. United States*, 340 U.S. 135 (1950), and later related cases. The estate's amended answer to plaintiff's amended complaint asserts that plaintiff's action is barred because plaintiff's injuries "arose out of or in the course of activity incident to his services in the military." The estate's answer to the government's third-party claim asserts that the government's claim is barred because Coffman was operating his vehicle within the line of duty when the accident occurred, and that plaintiff's injuries occurred "as an incident to military service."

The *Feres* court concluded that the government is not liable under the Federal Tort Claims Act (FTCA) for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146. That decision created a judicial exception to the FTCA's broad waiver of sovereign immunity. *Atkinson v. United States*, 825 F.2d 202, 204 (9th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988). The Supreme Court subsequently extended the *Feres* doctrine to *Bivens* claims, *see Chappell v. Wallace*, 462 U.S. 296 (1983); *United States v. Stanley*, 483 U.S. 669 (1987), and the Ninth Circuit has extended the immunity accorded to the government in *Feres* to actions between individual members of the military, recognizing an "intramilitary immunity" based on injuries suffered incident to

military service. *See e.g.*, *Stauber v. Cline*, 837 F.2d 395 (9th Cir.), *cert. denied*, 465 U.S. 817 (1988); *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir. 1985). When the process of distinguishing conduct not incident to service from conduct incident to service "would itself work an impermissible intrusion upon military matters, *Feres* must be applied to the whole course of conduct." *Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1487 (9th Cir. 1991). Not every action by one member of the armed services against another, however, occurs "incident to service."[1] *Id.* at 1485.

In deciding whether material issues of fact remain for trial and whether either of the parties is entitled to judgment as a matter of law, I have reviewed the material submitted on the certification issue, and supplemental materials submitted following the September 1, 1992 hearing. I have assumed that the estate bears the burden of establishing its "incident to service" intramilitary immunity affirmative defense by a preponderance of the evidence.[2]

Courts apply a totality-of-circumstances test in determining whether an injury occurred incident to service. *See Johnson v.*

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[1] The *Lutz* court noted that the Supreme Court has expressly rejected a rule that would entirely disallow the claims of military personnel. *Lutz*, 944 F.2d at 1485 (citing *Stanley*, 483 U.S. at 681).

[2] I also recognize, however, that the 9th Circuit has treated the *Feres* doctrine as a limitation on subject matter jurisdiction, *Stauber*, 837 F.2d at 398, at least raising the possibility that the burden is on plaintiff to show that the applicability of the doctrine does not pose a jurisdictional bar. I would grant summary judgment for plaintiff and the government even if I concluded that they bore the burden of proof here, because, based on the record as a whole, a trier of fact could conclude only that the accident in question did not occur "incident to service."

United States, 704 F.2d 1431, 1437 (9th Cir. 1983). Under that test, plaintiff and the government are entitled to summary judgment on the estate's intramilitary immunity defense. The evidence does not support the conclusion that plaintiff and Coffman were acting under any military orders or directions at the time of the accident. The alleged negligent act in question occurred off-post, while plaintiff and Coffman were on their own time, performing acts of their own choosing, not acts which they had received military instructions to perform. The accident occurred while plaintiff and Coffman were riding in a private vehicle, not long before they were due to attend the first formation, while not traveling on a route that would have led them most directly to Green's house. No training materials were found in Coffman's automobile.

Construing the facts most favorably for the estate, summary judgment for plaintiff and the government on the intramilitary immunity defense is appropriate. The *Lutz* court cited with approval the following explication of the limits of intramilitary immunity:

> When a soldier commits an act that would, in civilian life, make him liable to another, he should not be allowed to escape responsibility for his act *just because those involved were wearing military uniforms at the time of the act*. When military personnel are engaged in distinctly nonmilitary acts, they are acting, in effect, as civilians and should be subject to civil authority.

Lutz, 944 F.2d at 1487, (citing *Durant v. Neneman*, 884 F.2d 1350, 1353, 1354 (10th Cir. 1989) *cert. denied*, 493 U.S. 1024 (1990) (emphasis in original). From the evidence in the record, a trier of fact could conclude only that plaintiff and Coffman were engaged in "distinctly nonmilitary acts" when the accident occurred. The principles which underlie the doctrine of intramilitary immunity simply would not be served by application

of that doctrine to these facts. In the absence of facts from which a trier of fact could conclude that plaintiff and Coffman were acting "incident to military service," plaintiff and the government are entitled to summary judgment on defendants' intramilitary immunity defense.

CONCLUSION

I grant summary judgment for plaintiff and the government on defendants' affirmative intramilitary immunity defense. I DENY defendants' motions for a separate trial (#84 and 91) as moot.

DATED this ___ day of September, 1992.

_____

John Jelderks
United States Magistrate Judge

NINTH CIRCUIT OPINION

Val John GREEN, Plaintiff-Appellee,

v.

Gordon L. HALL, Personal Representative of the Estate of Michael D. Coffman; The Estate of Michael D. Coffman, Defendants-Appellants.

Richard M. ROBERTSON; The Salvation Army, a non-profit corporation, Defendants,

v.

Gordon L. HALL, Personal Representative of the Estate of Michael D. Coffman; The Estate of Michael D. Coffman, Third-party-plaintiffs-Appellants,

v.

UNITED STATES of America, Third-party-defendant-Appellee.

Val John GREEN, Plaintiff-Appellee,

v.

Richard M. ROBERTSON; The Salvation Army, a non-profit corporation, Defendants,

v.

Gordon L. HALL, Personal Representative of the Estate of Michael D. Coffman; The Estate of Michael D. Coffman,
Defendants-third-party-plaintiffs-appellants,

v.

UNITED STATES of America, Third-party-defendant-Third-party-plaintiff-Appellee.

Nos. 92-35280, 92-36770.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 1, 1993.

Decided Oct. 29, 1993

Army reservist brought action against estate of fellow reservist for injuries sustained in automobile accident that occurred while off base in second reservist's car. Estate added the United States as third-party defendant, removed action to federal court, and sought certification from Attorney General that second reservist was acting within scope of his employment at time of accident. The Attorney General denied certification, and estate sought judicial certification. The United States District Court for the District of Oregon, John A. Jelderks, United States Magistrate Judge, declined certification, and estate appealed. The Court of Appeals held that: (1) estate was not entitled to federal employee certification under the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA), and (2) estate was not immune from liability under *Feres* doctrine.

Affirmed.

1. Removal of Cases 21
United States 50(3), 50.5(1)

If Attorney General certifies that federal employee was acting within scope of his or her employment at time of event giving rise to civil claim, pursuant to the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA), the United States must be substituted as defendant in action and, if it was originally filed in state court, action must be removed to federal court, where plaintiff's single avenue of recovery is under the Federal Tort Claims Act (FTCA). 28 U.S.C.A. §§ 1346, 2671 et seq., 2679(d)(1-4).

2. United States 50.5(1)

Plaintiff may challenge Attorney General's scope of federal employment certification under the Federal Employees Liability Reform and Trot Compensation Act (FELRTCA), and if Attorney General denies certification, employee may petition district court for certification. 28 U.S.C.A. § 2679(d)(3).

3. United States 50.5(1)

Attorney General's decision regarding scope of federal employment certification under the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA) is subject to de novo review in both district court and on appeal, but where facts relevant to inquiry are in dispute, district court's factual findings are reviewed for clear error. 28 U.S.C.A. § 2679(d)(3).

4. United States 50.5(1)

Attorney General's decision regarding scope of employment certification under the Federal Employees Liability Reform and

Tort Compensation Act (FELRTCA) is conclusive unless challenged. 28 U.S.C.A. § 2679(d)(1-4).

5. United States 50.5(1)

Party seeking review of decision of Attorney General to grant or deny scope of federal employment certification under the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA) bears burden of presenting evidence and disproving Attorney General's decision by preponderance of evidence. 28 U.S.C.A. § 2679(d)(1-4).

6. United States 50.5(1, 3)

Respondeat superior principles of state in which alleged tort occurred are applied in determining whether federal employee acted within scope of his or her office or employment within meaning of Federal Employees Liability Reform and Tort Compensation Act (FELRTCA). 28 U.S.C.A. § 2679(d)(1-4).

7. United States 50.10(1)

Magistrate judge's conclusion that Army reservists left base to eat breakfast or to get donuts for others, rather than to retrieve training manuals, was not clearly erroneous, in reviewing decision of Attorney General declining to certify, under Federal Employees Liability Reform and Tort Compensation Act (FELRTCA), that driver was acting within scope of his employment as reservist at time of accident, in view of conflicting evidence presented regarding purpose of trip, length of time reservists were gone from base, and fact that accident occurred a few minutes from base without any training materials in car. 28 U.S.C.A. § 2679(d)(1-4).

8. United States 50.5(1), 50.10(1)

Army reservist was not acting within scope of his employment when he left base in car either to get breakfast or to get donuts or others, and therefore reservist's estate was not entitled to federal employment certification by Attorney General pursuant to Federal Employees Liability Reform and Tort Compensation Act (FELRTCA) in action for injuries sustained in automobile accident during trip off base; even if reservist derived some incidental benefit because reservist supplied edible food for rest of company, that benefit did not transform his personal trip into employment-related trip. 28 U.S.C.A. § 2679(d)(1-4).

9. United States 50.10(5)

Estate of Army reservist, killed in automobile accident while off base to eat breakfast or to get donuts, was not immune under *Feres* doctrine from liability for injuries sustained in accident; reservist was not injured incident to service, and his trip was a distinctly nonmilitary act.

Thomas J. Flaherty, Hillsboro, OR, for plaintiff-appellee.

William W. Younger, Asst. U.S. Atty., Portland, OR, for third-party plaintiff-defendant-appellee.

Phillip D. Chadsey, Stoel, Rives, Boley, Jones & Grey, Portland, OR, for defendants third-party plaintiffs-appellants.

Appeal from the United States District Court for the District of Oregon, John Jelderks, Magistrate Judge, Presiding.

Before: BROWNING, SCHROEDER, and HALL, Circuit Judges.

PER CURIAM:

Plaintiff Val Green was a passenger in an automobile driven by Michael Coffman, a fellow member of the Army Reserves, when an accident occurred, killing Coffman and seriously injuring Green. Green sued Coffman's estate in state court for damages. The estate added the United States as a third-party defendant, removed the action to federal court, and sought certification from the Attorney General that Coffman was acting within the scope of his employment as a Reservist at the time of the accident. The Attorney General denied certification, and the estate petitioned the district court to find and certify that Coffman was acting within the scope of his employment. The magistrate judge assigned to the case denied the petition after a hearing at which he received documentary evidence but heard no live testimony. The magistrate judge also rejected the estate's argument that it was immune from Green's suit under the *Feres* doctrine. The district court adopted the findings and recommendation of the magistrate judge. The estate appeals both rulings. We affirm.

I

On July 7-9, 1989, Green and Coffman were required to attend a weekend drill and training session at the Portland Air Base. Friday night they participated in a parachute jump, returning to the base at 3:00 AM. Coffman and Green slept at the base, while other Reservists apparently slept at home that night. All had to report for formation at either 9:00 AM or 9:30 AM the next morning. The parties apparently agree that Coffman, Green, and Sergeant McMahan, another Reservist, left the base at about 7:00 AM to eat breakfast, preferring restaurant food to the packaged "meals ready to eat" offered by the Army. Since none of them had cars big enough for three people, Green and Coffman travelled in Coffman's car, McMahan in his own. The record indicates that Green and Coffman may have had other purposes on their morning trip. Some evidence indicates Green intended to

return to his house to retrieve materials he would need for a training session he was to give later in the day, and some evidence indicates that Green, Coffman, and McMahan intended to bring doughnuts back to the other members of their company. Evidence also indicates that Coffman and Green returned to the base and left again, since they were seen leaving the base at about 8:30 AM.

At approximately 8:45 AM, Coffman's car collided with a Salvation Army truck. Coffman was killed, and Green was seriously injured. Coffman's car was headed west, away from the base, two blocks shy of Mary Jane's Coffee Shop, one of three places the Reservists had agreed to try for breakfast. The car was on one of several possible routes from the base to Green's house, although they had passed faster routes. No training materials or doughnuts were found in the car.

II

A

[1] The Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA") immunizes United States employees from liability for their "negligent or wrongful act[s] or omission[s] . . . while acting within the scope of [their] office or employment." 28 U.S.C. § 2679(b)(1). The Attorney General certifies whether a United States employee was acting within the scope of his or her employment at the time of an event giving rise to a civil claim. 28 U.S.C. § 2679(d)(1), (2). Once certification is given in a civil action, FELRTCA requires the substitution of the United States as the defendant, and, if the action was originally filed in state court, the removal of the action to federal court. *Id.* Under the terms of FELRTCA, the substitution of the United States leaves the plaintiff with a single avenue of recovery, the Federal Torts Claim Act ("FTCA"), 28 U.S.C. §§ 1346, 2671 *et seq.* 28 U.S.C. § 2679(d)(4).

[2,3] A plaintiff may challenge the Attorney General's scope of employment certification in the district court. *Meridian Int'l. Logistics, Inc. v. United States*, 939 F.2d 740, 745 (9th Cir.1991).

Likewise, if the Attorney General denies certification, as he did here, the employee may petition the court for certification. 28 U.S.C. § 2679(d)(3). The Attorney General's decision regarding scope of employment certification is subject to *de novo* review in both the district court and on appeal. *Meridian*, 939 F.2d at 745. Where facts relevant to this inquiry are in dispute, however, we review the district court's factual findings for clear error.[3] *Nadler v. Mann*, 951 F.2d 301, 305 (11th Cir.1992); *McCluggage v. United States*, 392 F.2d 395, 397 (6th Cir.1968).

[4,5] Though the certification issued by the Attorney General is subject to *de novo* review, FELRTCA grants the Attorney General the right to decide the scope of employment issue in the first instance. The Attorney General's decision regarding scope of employment certification is conclusive unless challenged. 28 U.S.C. § 2679(d)(1)-(4).[4] Accordingly, the party seeking review bears the burden of presenting evidence and disapproving the Attorney General's decision to grant or deny scope of employment certification by a preponderance of the evidence. *See S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1543 (11th Cir.1990) (burden of proof lies with party seeking to "alter[] the status quo" as determined by the Attorney General), *amended*, 924 F.2d 1555

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[3] The standard is clear even where the district court was faced with a purely written record. Fed.R.Civ.P. 52(a); *Phonetele, Inc. v. American Tel. & Tel. Co.*, 889 F.2d 224, 229 (9th Cir. 1989).

[4] The presumption in favor of the Attorney General's certification decision is clear from the Mandatory terms of FELRTCA: "Upon certification by the Attorney General . . ., any civil action [arising out of a government employee's official duties] *shall* be deemed an action against the United States . . ." 28 U.S.C. § 2679(d)(1) (emphasis added). *See S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1543 (11th Cir. 1990).

(11th Cir.1991); *accord Hamrick v. Franklin*, 931 F.2d 1209, 1211 (7th Cir.1991).

B

[6-8] In determining whether a United States employee acted within the scope of his or her office or employment within the meaning of FELRTCA, we apply the respondeat superior principles of the state in which the alleged tort occurred, in this case Oregon. *Pelletier v. Federal Home Loan Bank*, 968 F.2d 865, 876 (9th Cir.1992); *Proietti v. Civiletti*, 603 F.2d 88, 90 (9th Cir.1979). Oregon's law on the subject is clear:

> In deciding whether an employee was acting within the scope of his employment, the factors to be considered are [1] whether the act in question is of a kind the employee was hired to perform, [2] whether the act occurred substantially within the authorized limits of time and space, and [3] whether the employee was motivated, at least in part, by a purpose to serve the employer.

Stanfield v. Laccoarce, 284 Or. 651, 588 P.2d 1271, 1274 (1978). In applying these factors, the "ultimate question is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed." *Id.* (quoting Restatement (Second) of Agency § 229, comment a (1958)).

The parties dispute both the nature and purpose of Coffman's and Green's trip. Each cites evidence in the record indicating that Coffman and Green were headed to eat breakfast off the base, to get doughnuts for the rest of the company, to retrieve training materials from Green's house, or a combination of the three. The magistrate judge reviewed this evidence and concluded that the estate had not shown that it was more likely than not that Coffman was driving Green to his house to retrieve training materials. Since the estate had failed to meet its burden of proof, the

magistrate judge concluded that Coffman and Green left the base to breakfast or to get doughnuts for others.

This conclusion is not clearly erroneous. The deposition testimony and affidavits presented to the magistrate judge suggest that the two Reservists could have intended to pick up training materials, but they equally support the conclusion that the Reservists were after doughnuts or just breakfast. For instance, Coffman and Green left the base at 7:00 AM, but the accident occurred at 8:45 AM, a few minutes from the base, not on a direct route to Green's house, and without any training materials in the car.

Given the magistrate judge's findings, Coffman was not acting within the scope of his employment under Oregon law. The act Coffman was performing at the time of the accident, driving with a fellow Reservist either to breakfast or to get doughnuts for the rest of the company, was not an act "of a kind [he] was hired to perform" by the Army Reserves.[1] *Stanfield*, 588 P.2d at 1274. The Army provided food at the base which, although perhaps unpalatable, some of the Reservists apparently ate. Even if the Army Reserves derived some incidental benefit because Coffman supplied edible food to the rest of the company, that benefit does not transform Coffman's personal trip into an employment-related trip. *See Gosset v. Simonson*, 243 Or. 16, 411 P.2d 277, 281 (1966). Coffman was not acting "substantially within the [employer's] authorized limits of time and space at the time of the accident because he had no duties form 3:00 AM to 9:00 AM or

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[1] The Army's administrative finding that Coffman was acting in the "line of duty" the morning of the accident is irrelevant since is addresses whether Coffman was engaged in misconduct and his eligibility for medical benefits rather than whether he was acting within the scope of his employment under relevant state law. *Merritt v. United States*, 332 F.2d 397, 398 (1st Cir. 1964).

9:30 AM and was free to leave the base. *Stanfield*, 588 P.2d at 1274. The only purpose for Coffman's trip that would suggest a motivation to serve his employer, a trip to Green's house to retrieve training materials, has been rejected by the magistrate judge.

III

A

The United States is not liable under the FTCA for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146, 71 S.Ct. 153, 159, 95 L.Ed. 152 (1950). This circuit has extended *Feres* to "suits between individual members of the military, recognizing an 'intramilitary immunity' from suits based on injuries sustained incident to service." *Lutz v. Secretary of the Air Force*, 944 F.23 1477, 1480-81 (9th Cir.1991). Thus, the crucial question here is whether Green's injuries were sustained "incident to service."

We review *de novo* whether "the *Feres* doctrine is applicable to the facts reflected in the record." *McGowan v. Scoggins*, 890 F.2d 128, 129 (9th Cir.1989). The parties stipulated that the magistrate judge decide the *Feres* issue according to the standards for summary judgment. Accordingly, we draw all justifiable factual inferences in favor of the estate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

B

[9] We conclude Green was not injured "incident to service" within the meaning of the *Feres* doctrine. Green was injured while off base and before he was due at morning formation. His injuries were therefore related to his military status only "in the sense that all human events depend upon what has already transpired," which is insufficient. *Brooks v. United States*, 337 U.S. 49, 52, 69 S.Ct. 918, 920, 93 L.Ed. 1200 (1949); *see also Estate of McAllister v. United States*, 942 F.2d 1473, 1479-80 (9th

Cir.1991) (question is whether injuries are related to "individual's *status* as a member of the military") (internal quotations omitted). Green's trip was also a "distinctly nonmilitary act[]," since it was not done under orders, was not intended to benefit the military, and did not occur on military property. *Lutz*, 944 F.2d at 1487 (citing *Durant v. Neneman*, 884 F.2d 1350, 1354 (10th Cir.1989)).

AFFIRMED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_ _ _ _ _ _ _ _ _ _ _ _

NO. 92-35280
CT/AG#: CV-91-595-JAJ

VAL JOHN GREEN

Plaintiff - Appellee

v.

GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman; THE ESTATE OF MICHAEL D. COFFMAN

Defendants - Appellants

and

RICHARD M. ROBERTSON; THE SALVATION ARMY, a non-profit corporation

Defendants

v.

GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman; THE ESTATE OF MICHAEL D. COFFMAN

Third-party-plaintiffs

v.

UNITED STATES OF AMERICA

Third-party-defendant - Appellee
NO. 92-36770
CT/AG#: CV-91-595-JJ

VAL JOHN GREEN

Plaintiff - Appellee

v.

RICHARD M. ROBERTSON; THE SALVATION ARMY, a non-profit corporation

Defendants

and

GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman; THE ESTATE OF MICHAEL D. COFFMAN

Defendants-third-party-plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Third-party-defendant-third-party-plaintiff-Appellee

APPEAL FROM the Untied States District Court for the District of Oregon (Portland).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland)
and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.
Filed and entered 10/29/93

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Phillip D Chadsey, Esq.
Stoel Rives Boley Jones & Grey
900 SW Fifth Avenue
Suite 2300
Portland, OR 97204-1268

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VAL JOHN GREEN,

Plaintiff-Appellee,

v.

GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman; THE ESTATE OF MICHAEL D. COFFMAN,

Defendants-Appellants.

and

RICHARD M. ROBERTSON; THE SALVATION ARMY, a non-profit corporation,

Defendants,

v.

GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman; THE ESTATE OF MICHAEL D. COFFMAN,

Third-party-plaintiffs-Appellants

v.

No. 92-35280

D.C. No. CV-91-595-JAJ

UNITED STATES OF AMERICA, Third-party-defendant-Appellee. VAL JOHN GREEN, Plaintiff-Appellee, v. RICHARD M. ROBERTSON and THE SALVATION ARMY, a non-profit corporation, Defendants, v. GORDON L. HALL, Personal Representative of the Estate of Michael D. Coffman; THE ESTATE OF MICHAEL D. COFFMAN, Defendants-third-party-plaintiffs-appellants, v. UNITED STATES OF AMERICA, Third-party-defendant-Third-party-plaintiff-Appellee.	No. 92-36770 D.C. No. CV-91-595-JJ ORDER

Before: BROWNING, SCHROEDER, and HALL, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

DEPARTMENT OF THE ARMY
U.S. ARMY CLAIMS SERVICE
OFFICE OF THE JUDGE ADVOCATE GENERAL
FORT GEORGE ____, MEADE, MARYLAND 20755-5360

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Reply to
Attention of:
Tort Claims Division

SUBJECT: Claim of Val John Green, 91-011-T182

Mr. Thomas J. Flaherty
Attorney at Law
One Lincoln Center
10300 SW Greenburg Road
Suite 490
Portland, Oregon 97223

Dear Mr. Flaherty:

This notice constitutes final administrative action on the subject claim against the United States in the amount of $2,561,900 for personal injuries which allegedly occurred when Sergeant Green was a passenger in a vehicle owned and operated by Staff Sergeant Michael Coffman which collided with a Salvation Army vehicle in Portland, Oregon on July 8, 1989.

The claim is denied. Staff Sergeant Coffman was not in the scope of his employment at the time of the accident. Accordingly, there is no liability on the part of the United States. Even if Staff Sergeant Coffman was considered to be within the scope of his duties, the claim would be excluded from consideration by the incident to service doctrine. *Feres v. United States*, 340 U.S. 135 (1950).

I am required by regulation to inform you that if your client is dissatisfied with the action taken on the subject claim, he may file suit in an appropriate United States District Court no later than six months from the date of mailing of this letter or his remedy will be forever barred. This is not intended to imply that any such suit, if filed, would be successful.

Sincerely,

William C. Kirk
Lieutenant Colonel, U.S. Army
Chief, Tort Claims Division

Copies Furnished:

JALS-LT
SJA, HQ, I Corps and Fort Lewis

ARMY REGULATIONS
Chapter 39
Line of Duty Determinations

39-1. General

Line of duty determinations are essential for protecting the interest of both the individual concerned and the U.S. Government, where service is interrupted by injury, disease, or death. A person who becomes a casualty because of his or her intentional misconduct or willful negligence can never be said to be injured, diseased, or deceased in the line of duty. Such a person stands to lose substantial benefits as a consequence of his or her actions; therefore, it is critical that the decision to categorize injury, disease, or death as not in the line of duty only be made after the deliberated and ordered procedures described in this regulation are followed.

39-2. Requirements for LD Investigations

Line of duty investigations are conducted essentially to arrive at a determination as to whether misconduct or negligence was involved in the disease, injury, or death and, if so, to what degree. Depending on the circumstances of the case, an investigation may or may not be required to make this determination.

a. The LD determination is presumed to be "LD YES" without an investigation--

(1) In the case of disease, except as described in c(1) and (8) below.

(2) In the case of injuries clearly incurred as a result of enemy action or attack by terrorists.

(3) In the case of death due to natural causes or while a passenger in a common commercial carrier or military aircraft.

b. In all other cases of death or injury, except injuries so slight as to be clearly of no lasting significance (e.g., superficial lacerations/abrasions or mile heat injuries), an LD investigation must be conducted. (In death cases, the Army makes no determination. See para 37-3f.)

c. Investigations can be conducted informally by the chain of command where no misconduct or negligence is indicated, or formally where an investigating officer is appointed to conduct an investigation into suspected misconduct or negligence. In the following circumstances, a formal investigation must be conducted:

(1) Injury, disease, or medical condition that occurs under strange or doubtful circumstances or is apparently due to misconduct or willful negligence.

(2) Injury or death involving the abuse of alcohol or other drugs.

(3) Self-inflicted injuries or suicide.

(4) Injury or death incurred while AWOL.

(5) Injury or death that occurs while an individual was enroute to final acceptance in the Army.

(6) Death of a USAR or ARNG member while participating in authorized training or duty.

(7) Injury or death of a USAR or ARNG member while traveling to or from authorized training or duty.

(8) When a USAR or ARNG member serving on an active duty tour of 30 days or less is disabled due to disease.

(9) In connection with an appeal of an unfavorable finding of abuse of alcohol or other drugs (para 41-10a).

(10)Other cases when requested or directed.

DEPARTMENT OF THE ARMY
HEADQUARTERS, 3D BATTALION, 12TH SPECIAL FORCES GROUP

(AIRBORNE)
UNITED STATES ARMY RESERVE CENTER
HAMILTON ARMY AIRFIELD, CALIFORNIA 94949-5099

AFKE-AC-IL-MSFT 16 September 1989

MEMORANDUM FOR Captain Michael T. Wilson, 448-54-7011, Co B 3d Bn 12th SFG(Abn) PO Box 88668, Steilacoom, WA 98388-0668

SUBJECT: Appointment of Investigating Officer

1. You are hereby appointed an investigating officer in accordance with paragraph 38-3, Army Regulation 660-8-1. You are to conduct a formal Line of Duty investigation concerning the death of Sergeant First Class Michael David Coffman, 541-58-0700, United States Army Reserve, assigned to Co A 3d Bn 12th SFG(Abn). Sergeant First Class Coffman was killed in an automobile accident on 8 July 1989 while on Inactive Duty Training.

2. Paragraphs 39-2c(6) and 39-2c(7), AR 600-8-1, require a formal investigation when death of USAR personnel occurs while participating in authorized training/duty or while traveling to or from authorized training/duty. Chapter 40, AR 600-8-1 will be your guide in this matter.

3. You findings and recommendations will be submitted in four (4) copies with appropriate enclosures on DD Fm 281 (Report of Investigation--Line of Duty and Misconduct Status) to this headquarters, Attn: AFKE-AC-IL-MSFT, **Not Later Than** 16 October 1989.

FOR THE COMMANDER:

2 Encl
1. DA Fm 2173
2. Mssg-Subj: Casualty Report

GEORGE P MORRIS JR
Supervisory Staff
Administrator

CF:
Cdr, Co A 3/12th SFT, Portland, OR (w/o encl)
Cdr, 12th SFG(Abn), Arlington Heights, IL (w/o encl)

REPORT OF INVESTIGATION
LINE OF DUTY AND MISCONDUCT STATUS

20 October 1989

HQ, 3d Bn 12th SFG(A)
Bldg 442, USARC
Hamilton AAF, CA 94949-5099

COFFMAN, MICHAEL D. | 541-58-0700 | E-7

OD A2, Co A 3d Bn 12th SFG(A) Portland ANG Base, Portland OR

RSUTA 4/AAUTA

OTHER MILITARY PERSONNEL INVOLVED IN THE SAME INCIDENT	SERVICE NUMBER OR SSN	GRADE	LOD INVESTIGATION REQUIRED YES / NO
GREEN, VAL J.	566-76-8404	E-5	X

DURATION	DATE	HOUR
START	7 Jul 89	1900
FINISH	9 Jul 89	1700

0845 | 8 July 1989 | Portland, OR

AUTOMOBILE ACCIDENT | Dead on Arrival

See Attached 9g

Co B 3d Bn 12th SFG(A), Ft Lewis, WA
MICHAEL T. WILSON
O-3 | USAR

ACTION BY APPOINTING AUTHORITY

3d Bn 12th SFG(A) | 27 Oct 89

JAMES A. LILJEFELT
LTC/O5 | IN-USAR

ACTION BY REVIEWING AUTHORITY

"SAME AS FINAL APPROVING AUTHORITY"

AFZH-AGI
HQ, I CORPS AND FORT LEWIS, FORT LEWIS WA 98433-5000
REVIEWED FOR COMPLETENESS. No Determination made.
BY AUTHORITY OF THE SECRETARY OF THE ARMY:

D. P. SCHNEIDER
COL, AG
Adjutant General
DEC 6 1989

DD FORM 261

BEST AVAILABLE COPY

DD Form 261 pertaining to SFC Coffman, Michael D., 541-58-0700, 20 Oct 89; Item 9g:

SFC Coffman departed the U.S. Army Reserve Center at Portland Air National Guard Base at approximately 0745 on 8 July 1989. His purpose for leaving the center was to pick up training materials at SFG Val Green's residence. SFC Coffman did this with the knowledge and consent of his Detachment Operations Sergeant, MSG Steven M. Lucas. At approximately 0845 SFC Coffman was involved in a fatal automobile accident. It appears that based on the police accident report and statements from witnesses at the accident scene, SFC Coffman did not observe that the traffic signal was red and that he drove his vehicle through the intersection against the light where he was struck broad-side by a heavy delivery truck. My conversations with the Portland Police Department Investigation Officer, the police accident reports, and reports of witnesses at the scene indicate that SFC Coffman was not exceeding posted speed limits and was not driving in a reckless manner. I have spoken with SFC Coffman's Commanding Officer, his Detachment Operations Sergeant, and his civilian work supervisor. I have tried to reconstruct the 24-hour period preceding and leading up to the accident. I have examined police and hospital reports and spoken with police investigators. My observations are based on the above. SFC Coffman was an intelligent, extremely conscientious individual who took his civilian and military occupations seriously. It was not his nature to do things in a wreckless or careless manner. Within the preceding 24 hours of the accident SFC Coffman had worked a full day at his civilian employment after which he had reserve duty which lasted almost from the time he left his civilian job until approximately 0330 the next morning. He had received approximately 3 hours sleep during that 24 hour period. In addition to this he told his Operations Sergeant that he was not feeling well, and thought he might be coming down with the flu. Based on my findings, SFC

Coffman appeared to be suffering from fatigue from having performed military duties the whole night before and from a possible physical illness. SFC Coffman was most likely not the usual rested individual who drove through that intersection at approximately 0845 on 8 July 1989. After reviewing all of the attached evidence, my conclusion is that fatigue was a contributing, if not significant factor in this unfortunate accident which cost SFC Coffman his life */s/ 22 Nov 89*

The following Exhibits are attached:

A -- IO Appointment Memorandum

B -- DA Form 2173 Statement of Medical Examination and Duty Status

C -- Statement, SGT Val Green, Portland, OR Dated 18 Oct 89

D -- Statement, MSG Steven M. Lucas, Portland, OR Dated 18 Oct 89

E -- Statement, IO, dated 19 Oct 89

F -- Statement, IO, Dated 19 Oct 89

SWORN STATEMENT

For use of this form, see AR 190-45; the proponent agency is Office of The Deputy Chief of Staff for Personnel.

LOCATION	DATE	TIME	FILE NUMBER
Portland, oregon"	20 OCT 89	0900 HRS	

LAST NAME, FIRST NAME, MIDDLE NAME	SOCIAL SECURITY NUMBER	GRADE/STATUS
Lucas, Steven Martin	567-64-8822	E-6/USAR

ORGANIZATION OR ADDRESS

ODA-2, CO A, 3rd SF BN, 12th SFG(ABN), Box 28 Portland ANG Base, Portland, OR. 97218-2797

I, Steven M. Lucas, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

THE DRILL WEEKEND STARTED AT 1900 HRS ON 7 JUL 89. THERE WAS AN AIRBORNE OPERATION THAT NIGHT. SFC COFFMAN ASKED TO BE EXCUSED FROM THE JUMP DUE TO STOMACH DISTRESS. HE WAS GRANTED PERMISSION TO NOT JUMP, AND INSTEAD, BE A PART OF THE DROP ZONE PARTY. HIS DUTY WAS TO DRIVE A TWO AND A HALF TON TRUCK TO AND FROM THE DROP ZONE AFTER THE JUMP WE ARRIVED BACK AT THE RESERVE CENTER AT APPROXIMATELY 0330 HRS ON 8 JUL 89. WE STAYED IN THE BARRACKS AND SLEPT THE REMAINDER OF THE MORNING UNTIL WAKE-UP AT 0715 HRS.

AT APPROXIMATELY 0745 HRS THAT MORNING, SFC COFFMAN INDICATED THAT HE WAS GOING TO TAKE SGT GREEN TO PICK UP MATERIALS THAT HE (GREEN) HAD INADVERTENTLY LEFT AT HOME, THAT WERE NEEDED FOR CLASSES, TO BE GIVEN LATER THAT MORNING.

SFC COFFMAN HAD APPROVAL TO LEAVE THE RESERVE CENTER AT THIS TIME AS WE HAD NO OFFICIAL DUTIES UNTIL THE COMPANY FORMATION AT 0900 HRS. SFC COFFMAN WAS AWARE OF THE FORMATION AND THE TIME, AND INDICATED THAT THEY WOULD BE BACK IN TIME FOR THE FORMATION.

SHORTLY AFTER THE FORMATION HAD STARTED WORD WAS PASSED DOWN ABOUT THE ACCIDENT, WHICH EXPLAINED WHY THE SGT'S WERE NOT PRESENT.

END OF STATEMENT

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 2 PAGES
D		

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ___, TAKEN AT ___, DATED ___, CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE ___ OF ___ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

DA FORM 2823, JUL 72 — SUPERSEDES DD FORM 2823, 1 JAN 70, WHICH WILL BE USED.

BEST AVAILABLE COPY

DD Form 261 pertaining to SFC Coffman, Michael D., 541-58-0700, 20 Oct 89; Item 9g (continued):
G -- Accident Report
H -- Hospital Medical Report and Emergency Room Admittance Record
I -- Medical Examiner Examination of Remains Report
J -- Medical Examiner Blood Alcohol Test Report
K -- DD Form 2063 Record of Preparation and Disposition of Remains.

STATEMENT OF MEDICAL EXAMINATION AND DUTY STATUS

THRU	TO	FROM
Cdr, 3/12th SFC (Abn) Portland, OR 97218-2797 Cdr, 3/12th SFC (Abn) Hamilton AAF, CA 94949-5099	HQ, I Corps & Ft Lewis ATTN: AFZH-AGI-I Ft Lewis, WA 98433-5000	COMMANDER MADIGAN ARMY MEDICAL CENTER TACOMA, WA 98431-5303

1. NAME OF INDIVIDUAL EXAMINED	2. SSN	3. GRADE
COFFMAN, MICHAEL DAVID	541-58-0700	E7/SFC

4. ORGANIZATION AND STATION	5. ACCIDENT INFORMATION	
CO A 3/12th SFC (A) PORTLAND, OR 97218-2797	a. DATE 8 Jul 89	b. PLACE (City and State) Portland, Or

SECTION I - TO BE COMPLETED BY ATTENDING PHYSICIAN OR HOSPITAL PATIENT ADMINISTRATOR

6. INDIVIDUAL WAS ☐ OUT PATIENT ☐ ADMITTED ☒ DIED ON ARRIVAL

7. NAME OF HOSPITAL OR TREATMENT FACILITY: Emanuel Hospital ☐ CIVILIAN ☐ MILITARY

8. HOUR AND DATE ADMITTED

9. HOUR AND DATE EXAMINED: 0808 hrs, 8 Jul 89

10. NATURE AND EXTENT OF ☒ INJURY ☐ DISEASE ☒ RESULTING IN DEATH (Examiner): Chest & Head injuries

11. MEDICAL OPINION: a. INDIVIDUAL ☐ WAS ☒ WAS NOT UNDER THE INFLUENCE OF ☐ ALCOHOL ☐ DRUGS (Specify)
b. INDIVIDUAL ☒ WAS ☐ WAS NOT MENTALLY SOUND AT TIME OF EXAMINATION FOR ACTS PERFORMED
c. INJURY ☐ IS ☒ IS NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE.
d. INJURY ☒ WAS ☐ WAS NOT INCURRED IN LINE OF DUTY. BASIS FOR OPINION:
Pare & unknown

12. THE FOLLOWING DISABILITY MAY RESULT: ☐ TEMPORARY ☐ PERMANENT PARTIAL ☐ PERMANENT TOTAL
13a. BLOOD ALCOHOL TEST MADE: ☐ YES ☐ NO
13b. NO. OF ML'S OF ALCOHOL IN BLOOD

14. DETAILS OF ACCIDENT OR HISTORY OF DISEASE (Brief, clinical, concise):
SFC Coffman went thru a red light and was struck on drivers side by a Salvation Army delivery truck. Medical aid was summoned and he was taken to Emanuel Hospital, Portland Or.

15. DATE	17. TYPED OR PRINTED NAME OF ATTENDING PHYSICIAN OR PATIENT ADMINISTRATOR	16. SIGNATURE
9 Aug 89	PAUL D. WUERDEMAN, CPT MS	

SECTION II - TO BE COMPLETED BY UNIT COMMANDER OR UNIT ADVISER

18. DUTY STATUS: ☒ PRESENT FOR DUTY ☐ ABSENT WITHOUT AUTHORITY ☐ ABSENT WITH AUTHORITY: ☐ ON PASS ☐ ON LEAVE

19. HOUR AND DATE OF ABSENCE: a. FROM: b. TO:

20. ABSENCE WITHOUT AUTHORITY MATERIALLY INTERFERED WITH THE PERFORMANCE OF MILITARY DUTY (Explain in item 27 time of duty missed, nature of duty, and name of one who assumed duty): ☐ YES ☐ NO

21. INDIVIDUAL WAS ON ☐ ACTIVE DUTY ☐ ACTIVE DUTY FOR TRAINING ☒ INACTIVE DUTY TRAINING

22. HOUR AND DATE TRAINING: a. BEGAN: 1900 7 July 1989; b. ENDED: 1600 9 July 1989

23. ACCIDENT OCCURRED WHILE PROCEEDING ☐ DIRECTLY TO TRAINING ☒ DIRECTLY FROM TRAINING

24. MODE OF TRANSPORTATION	25. HOUR DEPARTURE TRAVEL	26. DISTANCE INVOLVED	27. NORMAL TIME FOR TRAVEL
NA	NA	NA	NA

28. DUTY STATUS AT TIME OF DEATH IF DIFFERENT FROM TIME OF INJURY OR CONTRACTION OF DISEASE: ☐ PRESENT FOR DUTY ☐ ABSENT WITH AUTHORITY ☐ ABSENT WITHOUT AUTHORITY

29. DETAILS OF ACCIDENT, INCLUDING CONDITIONS UNDER WHICH INJURY OR DISEASE WAS CONTRACTED, AND OTHER PERTINENT INFORMATION:
SFC Coffman was driving his POV with SGT Val J. Green, [illegible], as a passenger. They were either enroute to or returning from SGT Green's residence where they were picking up training aids to utilize during scheduled SQT training. Some specifics are difficult to determine as SFC Coffman died without regaining consciousness and SGT Green, who was severely injured, has no recollection of the accident or the events leading up to it. Witnesses state that SFC Coffman failed to see a red light at a controlled intersection and was struck broadside by a civilian heavy truck.

30. FORMAL LINE OF DUTY INVESTIGATION REQUIRED: ☒ YES ☐ NO

31. INJURY IS CONSIDERED TO HAVE BEEN INCURRED IN LINE OF DUTY (When determined on appeal): ☐ YES ☐ NO

32. DATE	33. TYPED NAME AND GRADE OF UNIT COMMANDER OR UNIT ADVISER	34. SIGNATURE
890819	PAUL L. HENDERSON, MAJ, SF, CDR	

NA FORM 2173 REPLACES DA FORM 2173, 1 JUNE 66, WHICH IS OBSOLETE.

BEST AVAILABLE COPY

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FILED

(2) 93 1776 MAY 9 1994

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

October Term, 1994

GORDON L. HALL, et al.,
Petitioners,

v.

VAL JOHN GREEN,
Respondent.

and

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Phillip D. Chadsey*
*Counsel of Record**
STOEL RIVES BOLEY JONES & GREY
900 SW Fifth Avenue, Ste. 2300
Portland, OR 97204-1268
Telephone: (503) 224-3380
Counsel for Petitioners

May 6, 1994

8

SUPPLEMENTAL APPENDIX

LINE OF DUTY INVESTIGATION

Supp. A-1

DEPARTMENT OF THE ARMY
HEADQUARTERS, 3D BATTALION, 12TH SPECIAL FORCES GROUP (AIRBORNE)
UNITED STATES ARMY RESERVE CENTER
HAMILTON ARMY AIRFIELD, CALIFORNIA 94949-5099

REPLY TO ATTENTION OF

AFKE-AC-IL-MSFT 16 September 1989

MEMORANDUM FOR Captain Michael T. Wilson, 448-54-7011, Co B 3d Bn 12th SFG(Abn)
PO Box 88668, Steilacoom, WA 98388-0668

SUBJECT: Appointment of Investigating Officer

1. You are hereby appointed an investigating officer in accordance with paragraph 38-3, Army Regulation 600-8-1. You are to conduct a formal Line of Duty investigation concerning the death of Sergeant First Class Michael David Coffman, 541-58-0700, United States Army Reserve, assigned to Co A 3d Bn 12th SFG(Abn). Sergeant First Class Coffman was killed in an automobile accident on 8 July 1989 while on Inactive Duty Training.

2. Paragraphs 39-2c(6) and 39-2c(7), AR 600-8-1, require a formal investigation when death of USAR personnel occurs while participating in authorized training/duty or while traveling to or from authorized training/duty. Chapter 40, AR 600-8-1 will be your guide in this matter.

3. Your findings and recommendations will be submitted in four (4) copies with appropriate enclosures on DD Fm 261(Report of Investigation--Line of Duty and Misconduct Status) to this headquarters, Attn: AFKE-AC-IL-MSFT, Not Later Than 16 October 1989.

FOR THE COMMANDER:

George P Morris Jr

GEORGE P MORRIS JR
Supervisory Staff
Administrator

2 Encl
1. DA Fm 2173
2. Mssg-Subj:
Casualty Report

CF:
Cdr, Co A 3/12th SFG, Portland, OR (w/o encl)
Cdr, 12th SFG(Abn), Arlington Heights, IL (w/o encl)

REPORT INVESTIGATION
LINE OF DUTY AND MISCONDUCT STATUS

20 October 1989

☐ INJURY ☐ DISEASE ☒ DEATH

TO: HQ, 3d Bn 12th SFG(A)
Bldg 442, USARC
Hamilton AAF, CA 94949-5099

NAME	SERVICE NUMBER	GRADE
COFFMAN, MICHAEL D.	541-58-0700	E-7

ORGANIZATION AND STATION OF INDIVIDUAL
OD A2, Co A 3d Bn 12th SFG(A) Portland ANG Base, Portland OR

OTHER MILITARY PERSONNEL INVOLVED IN THE SAME INCIDENT	SERVICE NUMBER	GRADE	LOD INVESTIGATION MADE
GREEN, VAL J.	544-74-8404	E-5	X

STATUS: 7 Jul 89 1900
DUTY: 9 Jul 89 1700

BASIS FOR FINDINGS

(1) CIRCUMSTANCES	(2) HOUR	(3) DATE	(4) PLACE
	0845	8 July 1989	Portland, OR

(5) DESCRIPTION OF INCIDENT: AUTOMOBILE ACCIDENT
(6) NATURE AND EXTENT OF INJURY OR MEDICAL DIAGNOSIS: Dead on Arrival

(7a) ☐ WAS ☐ WAS NOT PERFORMING DUTY
(7b) ☐ WITH ☐ WITHOUT AUTHORITY
(8) INTENTIONAL MISCONDUCT OR NEGLECT: ☐ WAS ☐ WAS NOT THE PROXIMATE CAUSE
(9) ☐ WAS ☐ WAS NOT HOSTILITY FOUND

REMARKS

See Attached 9g

FINDINGS (By the authority of the Secretary of the Army)
☐ IN LINE OF DUTY
☐ NOT IN LINE OF DUTY - NOT DUE TO OWN MISCONDUCT
☐ NOT IN LINE OF DUTY - DUE TO OWN MISCONDUCT

ORGANIZATION AND STATION OF INVESTIGATING OFFICER: Co B 3d Bn 12th SFG(A), Ft Lewis, WA
SIGNATURE AND TYPED NAME OF INVESTIGATING OFFICER: MICHAEL T. WILSON
GRADE: O-3 BRANCH: USAR SERVICE NO.: [redacted]

ACTION BY APPOINTING AUTHORITY
ORGANIZATION: 3d Bn 12th SFG(A) DATE: 27 Oct 89
☒ APPROVES ☐ DISAPPROVES
SIGNATURE AND TYPED NAME: JAMES A. LILJEFELT
GRADE: LTC/O5 BRANCH: IN-USAR SERVICE NO.: [redacted]

ACTION BY REVIEWING AUTHORITY
ORGANIZATION: DATE:
☐ APPROVES ☐ DISAPPROVES
SIGNATURE AND TYPED NAME: "SAME AS FINAL APPROVING AUTHORITY"
GRADE: BRANCH: SERVICE NO.:

FOR ACTION OF OFFICE DESIGNATED BY TITLE

AFZH-AGI
HQ, I CORPS AND FORT LEWIS, FORT LEWIS WA 98433-5000
REVIEWED FOR COMPLETENESS. No Determination made.
BY AUTHORITY OF THE SECRETARY OF THE ARMY:

D. P. SCHNEIDER
COL, AG
Adjutant General

DEC 6 1989

DD FORM 261

SUPERSEDED EDITION OF 1 AUG 57 IS OBSOLETE

DD Form 261 pertaining to SFC Coffman, Michael D., 541-58-0700, 20 Oct 89; Item 9g:

SFC Coffman departed the U.S. Army Reserve Center at Portland Air National Guard Base at approximately 0745 on 8 July 1989. His purpose for leaving the center was to pick up training materials at SFC Val Green's residence. SFC Coffman did this with the knowledge and consent of his Detachment Operations Sergeant, MSG Steven M. Lucas. At approximately 0845 SFC Coffman was involved in a fatal automobile accident. It appears that based on the police accident report and statements from witnesses at the accident scene, SFC Coffman did not observe that the traffic signal was red and that he drove his vehicle through the intersection against the light where he was struck broad-side by a heavy delivery truck. My conversations with the Portland Police Department Investigation Officer, the police accident reports, and reports of witnesses at the scene indicate that SFC Coffman was not exceeding posted speed limits and was not driving in a reckless manner. I have spoken with SFC Coffman's Commanding Officer, his Detachment Operations Sergeant, and his civilian work supervisor. I have tried to reconstruct the 24-hour period preceeding and leading up to the accident. I have examined police and hospital reports and spoken with police investigators. My observations are based on the above. SFC Coffman was an intelligent, extremely conscientious individual who took his civilian and military occupations seriously. It was not his nature to do things in a wreckless or careless manner. Within the preceeding 24 hours of the accident SFC Coffman had worked a full day at his civilian employment after which he had reserve duty which lasted almost from the time he left his civilian job until approximately 0330 the next morning. He had received approximately 3 hours sleep during that 24 hour period. In addition to this he told his Operations Seargent that he was not feeling well, and thought he might be coming down with the flu. Based on my findings, SFC Coffman appeared to be suffering from fatigue from having performed military duties the whole night before and from a possible physical illness. SFC Coffman was most likely not the usual rested individual who drove through that intersection at approximately 0845 on 8 July 1989. After reviewing all of the attached evidence, my conclusion is that fatigue was a contributing, if not significant factor in this unfortunate accident which cost SFC Coffman his life 22 NOV 89

The following Exhibits are attached:

A — IO Appointment Memorandum

B — DA Form 2173 Statement of Medical Examination and Duty Status

C — Statement, SGT Val Green, [redacted] Portland, OR Dated 18 Oct 89

D — Statement, MSG Steven M. Lucas, [redacted] Portland, OR Dated 18 Oct 89

E — Statement, IO, dated 19 Oct 89

F — Statement, IO, Dated 19 Oct 89

SWORN STATEMENT

For use of this form, see AR 190-45; the proponent agency is Office of The Deputy Chief of Staff for Personnel.

LOCATION	DATE	TIME	FILE NUMBER
Portland, oregon"	20 OCT 89	0900 HRS	

LAST NAME, FIRST NAME, MIDDLE NAME	SOCIAL SECURITY NUMBER	GRADE/STATUS
Lucas, Steven Martin	567-64-8822	E-8/USAR

ORGANIZATION OR ADDRESS

ODA-2, CO A, 3rd SF BN, 12th SFG(ABN), Box 28 Portland ANG Base, Portland, OR. 97218-2797

I, Steven M. Lucas, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

THE DRILL WEEKEND STARTED AT 1900 HRS ON 7 JUL 89. THERE WAS AN AIRBORNE OPERATION THAT NIGHT. SFC COFFMAN ASKED TO BE EXCUSED FROM THE JUMP DUE TO STOMACH DISTRESS. HE WAS GRANTED PERMISSION TO NOT JUMP, AND INSTEAD, BE A PART OF THE DROP ZONE PARTY. HIS DUTY WAS TO DRIVE A TWO AND A HALF TON TRUCK TO AND FROM THE DROP ZONE. AFTER THE JUMP WE ARRIVED BACK AT THE RESERVE CENTER AT APPROXIMATELY 0330 HRS ON 8 JUL 89. WE STAYED IN THE BARRACKS AND SLEPT THE REMAINDER OF THE MORNING UNTIL WAKE-UP AT 0715 HRS.

AT APPROXIMATELY 0745 HRS THAT MORNING, SFC COFFMAN INDICATED THAT HE WAS GOING TO TAKE SGT GREEN TO PICK UP MATERIALS THAT HE (GREEN) HAD INADVERTENTLY LEFT AT HOME, THAT WERE NEEDED FOR CLASSES, TO BE GIVEN LATER THAT MORNING.

SFC COFFMAN HAD APPROVAL TO LEAVE THE RESERVE CENTER AT THIS TIME AS WE HAD NO OFFICIAL DUTIES UNTIL THE COMPANY FORMATION AT 0900 HRS. SFC COFFMAN WAS AWARE OF THE FORMATION AND THE TIME, AND INDICATED THAT THEY WOULD BE BACK IN TIME FOR THE FORMATION.

SHORTLY AFTER THE FORMATION HAD STARTED WORD WAS PASSED DOWN ABOUT THE ACCIDENT, WHICH EXPLAINED WHY THE SGT'S WERE NOT PRESENT.

END OF STATEMENT

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 2 PAGES
D		

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ___, TAKEN AT ___, DATED ___, CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE ___ OF ___ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

DA, FORM 2823 SUPERSEDES DA FORM 2823, 1 JAN 72, WHICH WILL BE USED.

DD Form 261 pertaining to SFC Coffman, Michael D., 341-58-0700, 20 Oct 89;
Item 9g (continued):

C — Accident Report

H — Hospital Medical Report and Emergency Room Admittance Record

I — Medical Examiner Examination of Remains Report

J — Medical Examiner Blood Alcohol Test Report

K — DD Form 2063 Record of Preparation and Disposition of Remains.

~~L — Copy of Letters of Sympathy to Next of Kin~~

STATEMENT OF MEDICAL EXAMINATION AND DUTY STATUS

For use of this form, see AR 600-33; the proponent agency is The Adjutant General's Office.

THRU (Include ZIP Code)	TO (Include ZIP Code)	FROM (Include ZIP Code)
Cdr, 3/12th SFG (Abn) Portland, OR 97218-2797 Cdr, 3/12th SFG (Abn) Hamilton AAF, CA 94949-5099	HQ, I Corps & Ft Lewis ATTN: AFZH-AGI-I Ft Lewis, WA 98433-5000	COMMANDER MADIGAN ARMY MEDICAL CENTER TACOMA, WA 98431-5303

1. NAME OF INDIVIDUAL EXAMINED (Last, First, and Middle Initial)	2. SSN	3. GRADE
COFFMAN, MICHAEL DAVID	541-58-0700	E7/SFC

4. ORGANIZATION AND STATION	5. ACCIDENT INFORMATION	
	a. DATE	b. PLACE (City and State)
CO A 3/12th SFG (A) PORTLAND, OR 97218-2797	8 Jul 89	Portland, Or

SECTION I - TO BE COMPLETED BY ATTENDING PHYSICIAN OR HOSPITAL PATIENT ADMINISTRATOR

6. INDIVIDUAL WAS ☐ OUT PATIENT ☐ ADMITTED ☒ DEAD ON ARRIVAL	7. NAME OF HOSPITAL OR TREATMENT FACILITY ☐ CIVILIAN ☐ MILITARY
	Emanuel Hospital

8. HOUR AND DATE ADMITTED	9. HOUR AND DATE EXAMINED
	0808 hrs, 8 Jul 89

10. NATURE AND EXTENT OF ☒ INJURY ☐ DISEASE ☒ RESULTING IN DEATH (Examiner)

Chest & Head injuries

11. MEDICAL OPINION: a. INDIVIDUAL ☐ WAS ☒ WAS NOT UNDER THE INFLUENCE OF ☐ ALCOHOL ☐ DRUGS (Specify)

b. INDIVIDUAL ☒ WAS ☐ WAS NOT MENTALLY SOUND (Unless Psychiatric examination is attached).

c. INJURY ☐ IS ☒ IS NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE.

d. INJURY ☒ WAS ☐ WAS NOT INCURRED IN LINE OF DUTY. BASIS FOR OPINION:

Para a unknown

12. THE FOLLOWING DISABILITY MAY RESULT	13. BLOOD ALCOHOL TEST MADE	14. NO. OF MG ALCOHOL PER 100 ML BLOOD
☐ TEMPORARY ☐ PERMANENT PARTIAL ☐ PERMANENT TOTAL	☐ YES ☐ NO	

15. DETAILS OF ACCIDENT OR HISTORY OF DISEASE (Date, onset, place)

SFC Coffman went thru a red light and was struck on driver's side by a Salvation Army delivery truck. Medical aid was summoned and was taken to Emanuel Hospital, Portland Or.

16. DATE	17. TYPED OR PRINTED NAME OF ATTENDING PHYSICIAN OR PATIENT ADMINISTRATOR	18. SIGNATURE
7 Aug 89	PAUL D. WUERDEMAN, CPT MS	

SECTION II - TO BE COMPLETED BY UNIT COMMANDER OR UNIT ADVISER

19. DUTY STATUS	20. HOUR AND DATE OF ABSENCE	
☒ PRESENT FOR DUTY ☐ ABSENT WITHOUT AUTHORITY ☐ ABSENT WITH AUTHORITY: ☐ ON PASS ☐ ON LEAVE	a. FROM	b. TO

21. ABSENCE WITHOUT AUTHORITY MATERIALLY INTERFERED WITH THE PERFORMANCE OF MILITARY DUTY (Explain in item 27 if duty involved death of man, and state if one of the men mentioned was questioned)

☐ YES ☐ NO

22. INDIVIDUAL WAS ON	23. HOUR AND DATE TRAINING	
☐ ACTIVE DUTY ☐ ACTIVE DUTY FOR TRAINING ☒ INACTIVE DUTY TRAINING	a. BEGAN	b. ENDED
	1900 7 July 1989	1600 9 July 1989

24. RESERVIST DIED OF INJURIES RECEIVED PROCEEDING ☐ DIRECTLY TO TRAINING ☐ DIRECTLY FROM TRAINING

25. MODE OF TRANSPORTATION	26. HOUR BEGINNING TRAVEL	27. DISTANCE INVOLVED	28. NORMAL TIME FOR TRAVEL
NA	NA	NA	NA

29. DUTY STATUS AT TIME OF DEATH IF DIFFERENT FROM TIME OF INJURY OR CONTRACTION OF DISEASE

☐ PRESENT FOR DUTY ☐ ABSENT WITH AUTHORITY ☐ ABSENT WITHOUT AUTHORITY

30. DETAILS OF ACCIDENT: REMARKS (If additional space is needed, continue on reverse, indicating item number in question)

SFC Coffman was driving his POV with SGT Val J. Green, [illegible], as a passenger. They were either enroute to or retruning from SGT Green's residence where they were picking up training aids to utilize during scheduled SQT training. Some specifics are difficult to determine as SFC Coffman died without regaining consciousness and SGT Green, who was severely injured, has no recollection of the accident or the events leading up to it. Witnesses state that SFC Coffman failed to see a red light at a controlled intersection and was struck broadside by a civilian heavy truck.

31. FORMAL LINE OF DUTY INVESTIGATION REQUIRED	32. INJURY IS CONSIDERED TO HAVE BEEN INCURRED IN LINE OF DUTY (If considered on merits)
☒ YES ☐ NO	☐ YES ☐ NO

33. DATE	34. TYPED NAME AND GRADE OF UNIT COMMANDER OR UNIT ADVISER	35. SIGNATURE
890819	PAUL L. HENDERSON, MAJ, SF, USAR	

DA FORM 2173

REPLACES DA FORM 2173, 1 JUNE 56, WHICH IS OBSOL[illegible]

93-1776

No. _____

Supreme Court, U.S.
FILED
JUN 3 1994
OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1994

GORDON L. HALL, et al.,

Petitioners,

v.

VAL JOHN GREEN,

Respondent.

and

UNITED STATES OF AMERICA,

Respondent.

RESPONDENT VAL JOHN GREEN'S BRIEF IN OPPOSITION

Thomas H. Flaherty*
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Val John Green

May 31, 1994

QUESTIONS PRESENTED

1. Whether, during a weekend of inactive duty training, Army reservists who are injured in a traffic accident while off-post on a personal excursion of their own — on their own free time, in a private automobile, and not under orders — may be considered as injured in a "line of duty" status for purposes of peace time disability compensation, but at the same time, their injuries are not "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service," and thus tort liability for their injuries is not subject to the intramilitary immunity derived from the *Feres* doctrine?

2. Whether the *Feres* doctrine should be overruled as plain error because it is unlawful, court-made legislation which unfairly extends an intramilitary immunity from tort liability to the peace time, non-combatant activities of servicemen?

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STATEMENT OF THE CASE

The following facts attend the traffic accident which befell the plaintiff-respondent. They are taken verbatim from the opinion of the Magistrate issued after a hearing on cross-motions for summary judgment with respect to the applicability, or not, of *Feres v. United States*, 340 U.S. 135 (1950).

BACKGROUND

> Plaintiff Green and decedent Coffman were both sergeants in the United States Army Reserve assigned to a Special Forces Group in Portland, Oregon. On the evening of Friday, July 7, 1989, they went to the Portland Air Base for a weekend of inactive duty training. They left the base on a training exercise and returned to the base at approximately 3:00a.m. the following morning, Saturday, July 8, 1989. They and the rest of their company were then allowed either to leave or remain on the base until the first formation at 9:00 or 9:30 a.m. Green and Coffman chose to remain on the base.
>
> Though it is impossible to reconstruct their movements or intentions that morning with confidence, it appears that the two awoke between 6:00 a.m. and 6:30 a.m. Green, Coffman, and Sergeant McMahan, another member of the same company, left the base at approximately 7:00 a.m. According to McMahan's affidavit, the three decided to leave the base to eat breakfast, preferring to eat at a restaurant rather than eat the "meals ready to eat" provided to those who stayed. McMahan added that Green and Coffman told him that they had to go to Green's house to pick up some unspecified training materials to be used later that day. McMahan also said that he, Green, and Coffman agreed to bring

back donuts for team members who stayed on the base. McMahan left the base in his own vehicle a few minutes after Green and Coffman had left together. After failing to find Green and Coffman, he ate alone and returned to the base.

There is some evidence that Green and Coffman returned to the base and left again. Master Sergeant Steven Lucas, also a member of the Special Forces Group, stated in his affidavit that he saw the two leaving the team room between 8:30 and 8:40 a.m. At any rate, it is clear that the two left the base in a 1988 Buick driven by Coffman, and owned by Eastman Kodak Company, Coffman's employer. At approximately 8:45 a.m., that automobile collided with a truck owned by the Salvation Army at the intersection of N.E. Lombard and N.E. Martin Luther King Boulevard. Coffman's vehicle was westbound, headed away from the base, and not on the most direct path to Green's residence at 2915 S.E. 35th Place, at the time of the collision. Coffman died, and Green suffered serious injuries. Neither donuts nor training notes or other service-related materials or equipment were found in Coffman's automobile (Pet. App. pp. A-30 to A-32). (Footnotes omitted.)

In point of fact, the Court of Appeals more precisely found,

...Coffman's car was headed west, away from the base, two blocks shy of Mary Jane's Coffee Shop, one of three places the Reservists had agreed to try for breakfast. The car was on one of several possible routes from the base to Green's house, although they had passed faster routes . . . . (Pet. App., p. A-45).

See the Map at A-1.

COMMENT

Petitioner first raised its question number one at oral argument before the Ninth Circuit Court of Appeals. The issue is not properly preserved for review by this court, and respondent objects to its submission.

The Court should also notice that petitioner's argument strains the facts when it contends that respondent went off-post to "go to breakfast because there are no mess facilities on base," Pet. Br., p. 11. They had rations on base. Pet. App., pp. A-31, A-44.

SUMMARY OF ARGUMENTS

This brief examines the difference in amplitude between the broad compass of a "line of duty" determination for peace time disability coverage for reservists on inactive duty for training and the less embrasive compass of activities which are deemed to be"incident to service" under the *Feres* doctrine. The still more limited realm of course and scope of employment is not visited in this brief.

A "line of duty" determination for purposes of peace time disability compensation for reservists is generous in scope. Reservists are covered by compensation "while travelling to or from authorized training or duty." AR 600-8-1 §39-2(c)(7). Pet. App., pp. A-59 to A-60.

Furthermore, a reservist's off-post excursion in a private vehicle on his own free time and not while under orders, whether to get donuts or to retrieve forgotten training materials, is a reservist's personal preparation for military activity, but it is not military activity itself. It is "incident to service" only "in the sense that all human events depend upon what has already transpired." *Brooks v. United States*, 337 U.S. 49, 52 (1949).

If the *Feres* doctrine were to preclude civil tort liability in this case, then, once again, that court-made legislation will do a grave injustice to our servicemen. The doctrine is judicial legislation which creates a sizeable enclave of tort immunity within the ambit of the Federal Tort Claims Act with respect to a serviceman's noncombatant activities in peace time.

REASONS FOR DENYING THE WRIT

1. The "Distinctly Nonmilitary Act" of Respondent's Off-Post Excursion Is Outside the Scope of the *Feres* Doctrine.

The slender thread of petitioner's argument in favor of the writ is the line of duty determination of respondent's and petitioner's decedent's eligibility as reservists on inactive duty for training for peace time disability compensation. Petitioner states,

> The line-of-duty test is more limited than the incident to service test. The issue of whether a serviceman was acting within the line-of-duty does not even arise unless his status at the time is incident to service. Pet. Br., p. 6.

But in a footnote, petitioner contradicts this notion altogether. Petitioner quotes from Army Regulation (AR) 600-8-1 §39-2(c)(7), which provides for a line of duty determination for "injury or death of a USAR or ARNG member while traveling to or from authorized training or duty." 10 U.S.C. §1202; 38 U.S.C. §§ 101(16), 105(1); *Merritt v. United States*, 332 F.2d 397, 398 (1st Cir. 1964).

In this case, the commuter activity is entirely civilian in character. Two reservists, off-post on their own free time and not under orders, driving a civilian car to buy donuts or to retrieve forgotten

training materials, is activity which is simply preparatory to military service, and not military activity itself. It is an activity which is "incident to service" only "in the sense that all human events depend upon what has already transpired." *Brooks v. United States*, 337 U.S. 49, 52 (1950). Even though in the line of duty for peace time disability compensation, AR 600-8-1 §39-2(c)(7), respondent's and petitioner's decedent's activities at the time of the accident were "distinctly nonmilitary acts," *Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1487 (9th Cir. 1991), and thus their serious injuries are not injuries which "arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950).

They did not lose their valuable right to civil recourse merely because they were in uniform at the time of the collision. *Durant v. Neneman*, 884 F.2d 1350, 1354 (10th Cir. 1989).

2. The *Feres* Doctrine Should Be Overruled As Court-Made Legislation Which Unfairly Deprives Servicemen of Their Civil Right to Recourse for Wrong Done to Their Person.

A. The Judicial Origin Of The *Feres* Doctrine

In 1946, Congress dissolved the barrier of sovereign immunity with the passage of the Federal Tort Claims Act, 28 U.S.C. §§1346 and 2641 et seq. which renders the government liable in tort:

> [U]nder circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. §1346(b).

Congress enacted an exception to the FTCA's "sweeping" waiver of immunity, *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1950), with respect to military activity, excluding "[a]ny claim arising out of the *combatant activities of the military . . . during time of war.*" 28 U.S.C. §2680(j) (Emphasis added).

The FTCA's "combatant activities" exception was first construed by the Supreme Court in *Brooks v. United States,* 337 U.S. 49 (1949). There, an Army truck driven by a civilian, negligently struck two off-duty servicemen riding in their own vehicle on a public highway, killing one serviceman and seriously injuring the other.

The court held that it would be "absurd" not to believe the "any claim" language of the FTCA meant "any claim but that of a serviceman." *Id.* at 51. Turning to the "combatant activities" exception, the court stated:

> The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. *Brooks v. United States*, supra, 337 U.S. at 52.

Despite the plain meaning of Congress' words in the "combatant activities" exception to the FTCA, ordinarily regarded as conclusive upon the court's construction, *West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83, 99 (1991); and despite the rule of construction that express mention of an exception impliedly excludes other exceptions, *Andrews v. Glover Const. Co.*, 446 U.S. 608, 616-

17 (1980); the Court created an exception to the FTCA which includes all manner of peace time, noncombatant activities which "arise out of or are in the course of activity incident to service," *Feres v. United States*, 340 U.S. 135, 146 (1950), thus creating a sizeable enclave of tort immunity within the body of the FTCA.

Known as the *Feres* doctrine, it is now subject to "widespread almost universal criticism." *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1246 (E.D. NY 1980). According to the four dissenting Justices in *United States v. Johnson*, 481 U.S. 699, 700 (1987), "*Feres* was wrongly decided" and the court should "limit our clearly wrong decision in *Feres* and confine the unfairness and irrationality that decision has had." *Id.*, 481 U.S. at 703. *See, also, Persons v. United States*, 925 F.2d 292, 299 (9th Cir. 1990):

> It would be tedious to recite, once again, the countless reasons for feeling discomfort with *Feres*, . . . seemingly manacled by precedent, this Circuit has repeatedly expressed its strong reservations before ultimately overcoming them. . . .

B. *Feres* Is Judicial Legislation

The only military exception to the government's liability to servicemen "under circumstances where the United States, if a private person, would be liable," 28 U.S.C. §1346(b), is found in 28 U.S.C. §2680(j): "Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."

The *Feres* Court, however, created a noncombatant, peace time bar to servicemen's claims against the government, and later, by Circuit pronouncement, between the servicemen themselves. *Lutz v. Secretary of the Air Force, supra*, 944 F.2d at 1480-81.

By what authority did the *Feres* Court create this exception to tort liability -- so clearly in conflict with the "sweeping" waiver of governmental immunity, *United States v. Yellow Cab Co., supra,* 340 U.S. at 547 -- and enact by judicial fiat a broad immunity from tort liability for servicemen engaged in noncombatant, peace time activities? Congress itself *expressly limited* that immunity to "combatant activities . . . during time of war." 28 U.S.C. §2680(j). The *Feres* doctrine is not just filling a gap left by Congress' silence, it is "rewriting rules that Congress has affirmatively and specifically enacted." *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

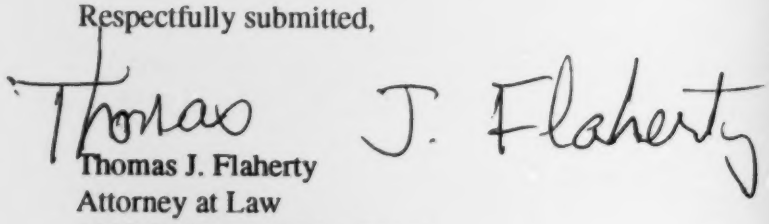
> Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied. *United States v. Rutherford,* 442 U.S. 544, 555 (1979). (Citations omitted).

Accordingly, the creation vel non of an intramilitary immunity from tort liability belongs to Congress in the first instance. The *Feres* doctrine should be overruled as plain error.

CONCLUSION

The writ should be denied because this is not a *Feres* case. The injury producing activity was "distinctly nonmilitary" in character, being the indubitable equivalent of a civilian traffic accident. If this were a *Feres* case, the court should then overrule *Feres* as an undue judicial encroachment upon the FTCA's express limitation of tort immunity in the military sphere to "combatant activities . . . during time of war."

Respectfully submitted,



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May 31, 1994

APPENDIX

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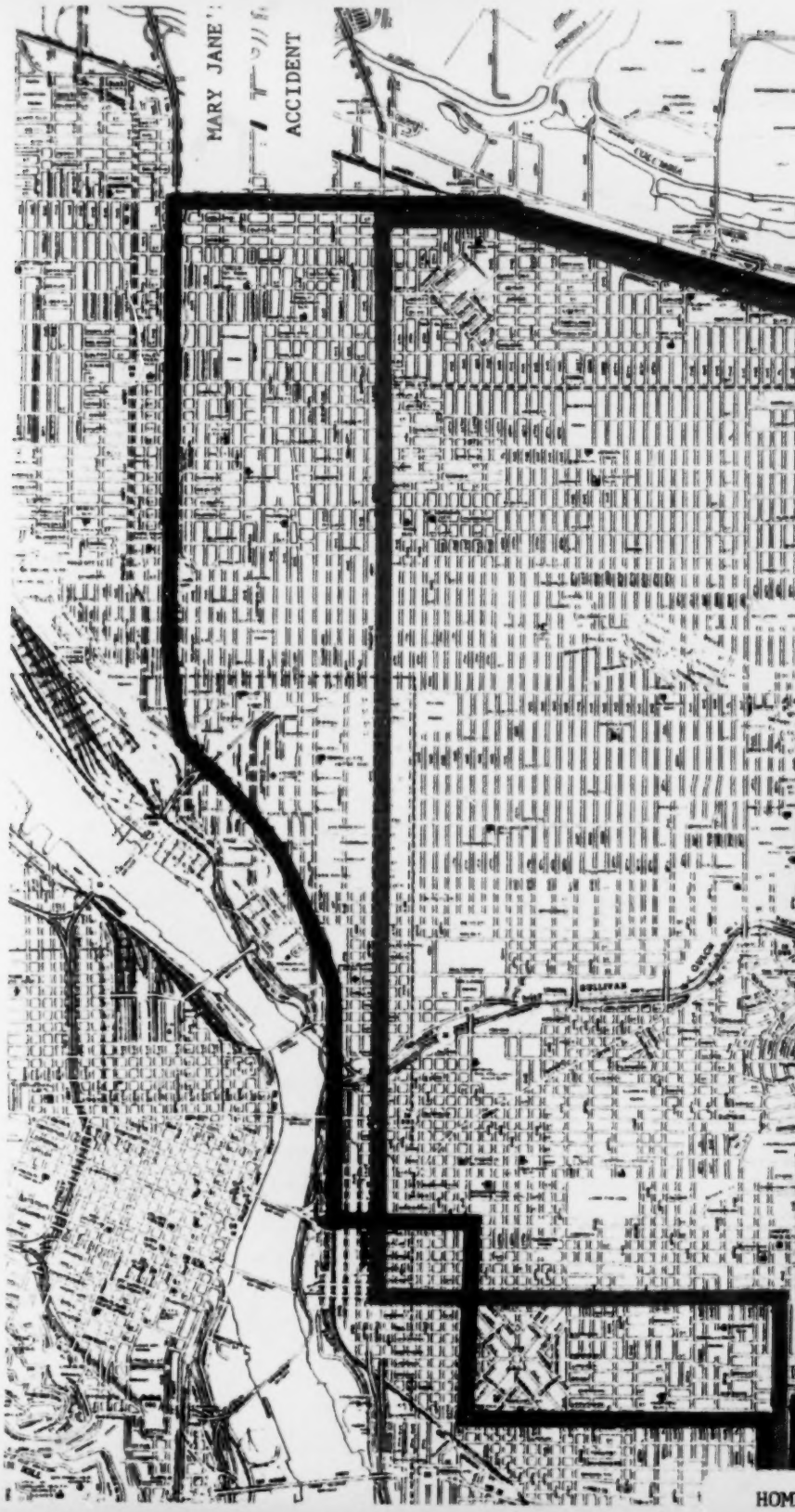

BASE
36 MINS.
37 MINS.
42 MINS.
46 MINS.
MAYWOOD
PARK

STATUTES

10 U.S.C. §1202. **Regulars and members on active duty for more than 30 days: temporary disability retired list**

Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 270(b) of this title) for a period of more than 30 days, would be qualified for retirement under section 1201 of this title but for the fact that his disability is not determined to be of a permanent nature, the Secretary shall, if he also determines that accepted medical principles indicate that the disability may be of a permanent nature, place the member's name on the temporary disability retired list, with retired pay computed under section 1401 of this title.

38 U.S.C. §101. **Definitions**

(16) The term "service-connected" means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service.

38 U.S.C. §105. **Line of duty and misconduct**

(a) An injury or disease incurred during active military, naval, or air service will be deemed to have been incurred in line of duty and not the result of the veteran's own misconduct when the person on whose account benefits are claimed was, at the time the injury was suffered or disease contracted, in active military, naval, or air service, whether on active duty or on authorized leave, unless such injury or disease was a result of the person's own willful misconduct or abuse of alcohol or drugs.

(4)

No. 93-1776

FILED
AUG 19 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

GORDON L. HALL, ET AL., PETITIONERS

v.

VAL JOHN GREEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

QUESTIONS PRESENTED

1. Whether petitioner's decedent was injured "in the course of activity incident to service" for purposes of the intramilitary immunity defense recognized in *Feres* v. *United States,* 340 U.S. 135, 146 (1950), and later decisions of this Court.

2. Whether the government was entitled to reimbursement from petitioner under 42 U.S.C. 2651 for the medical care it provided to a servicemember who was injured when the car that petitioner's decedent was driving collided with another vehicle.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1776

GORDON L. HALL, ET AL., PETITIONERS

v.

VAL JOHN GREEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A39-A50) is reported at 8 F.3d 695. The opinion of the magistrate judge (Pet. App. A28-A38) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A51-A53) was entered on October 29, 1993. A petition for rehearing was denied on February 9, 1994. Pet. App. A54-A56. The petition for a writ of certiorari was filed on May 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is an action by respondent Val John Green for injuries that he sustained in a car accident on July 8, 1989. At the time of the accident, Green was in the United States Army Reserve. The accident occurred when the car in which Green was a passenger collided with a truck owned by the Salvation Army. The car in which Green was riding was driven by a fellow Reservist, Michael Coffman. The accident killed Coffman and seriously injured Green. Pet. App. A44.

The federal magistrate judge made findings about some of the events that led up to the accident, as follows: Green and Coffman began a weekend of inactive duty training at the Portland (Oregon) Air Base on the evening of Friday, July 7, 1989. After a training exercise, the two men returned to the base with the rest of their company at 3:00 a.m. on Saturday, July 8. The company was allowed either to stay on the base or to leave the base until the first formation at 9:00 or 9:30 a.m. that same day. Green and Coffman stayed on base until about 6:00 a.m., when they and a third man, Sergeant McMahan, left the base to eat breakfast. According to McMahan (in testimony that the magistrate judge did not credit), they planned not only to get breakfast but also to buy doughnuts to bring back for other members of the company and to stop at Green's house for training materials. Green and Coffman left in Coffman's car, with Coffman driving; McMahan left the base a few minutes later in his car. McMahan lost track of the other two men; he ate breakfast alone and returned to the base. Coffman and Green collided with the Salvation Army truck at about 8:45 a.m. At the time of the collission, their car was headed away from the base and was not on the most direct route to Green's home. Neither doughnuts nor training materials were found in the car. Green

claimed that he did not remember the events of that Saturday morning. Pet. App. A30-A32.

2. a. Green (respondent here) filed this action for damages in Oregon state court. He named as defendants Coffman's estate, the personal representative of the estate (petitioner Hall), the Salvation Army, and the driver of the Salvation Army truck. He alleged that the accident was caused by the negligence of both Coffman and the truck driver. Pet. App. A1-A4.

Coffman's estate responded in three ways. It removed the action to the United States District Court for the District of Oregon under 28 U.S.C. 1442(a)(1).[1] It asked the Attorney General to certify that Coffman was "acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1).[2] And it filed a third-party claim against the United States, alleging that the United States was liable for any judgment against the estate because Coffman was acting within the scope of his employment when he collided with the truck. Pet. App. A32-A33, A44.

After the government was added as a third-party defendant, it filed a claim against Coffman's estate seeking reimbursement under 42 U.S.C. 2651 for the medical care it gave Green. Pet. App. A33.[3]

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[1] 28 U.S.C. 1442(a)(1) authorizes the removal from state court to federal court of any action against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office."

[2] When the Attorney General makes such a certification under 28 U.S.C. 2679(d)(1), the action is deemed to be an action against the United States, rather than the individual employee, under the Federal Tort Claims Act, and the United States is substituted for the employee as the defendant.

[3] 42 U.S.C. 2651(a) provides that when the government is authorized or required to render medical care to an injured person and does

b. The Attorney General refused to certify that Coffman was acting within the scope of his employment. The estate moved the district court for such a certification under 28 U.S.C. 2679(d)(3). A magistrate judge recommended that the motion be denied. He based that recommendation on his conclusion that "Coffman's destination and motivation at the time of the accident could not be determined," and that "even if Coffman had been driving to retrieve [Green's training materials], [Coffman] probably would have been acting outside the scope of his service-related employment." Pet. App. A33-A34. The district court adopted that recommendation and denied the motion for certification. *Id.* at A44. Coffman's estate appealed that ruling to the Ninth Circuit. *Id.* at A34, A44; see *Pelletier* v. *Federal Home Loan Bank*, 968 F.2d 865 (9th Cir. 1992) (denial of certification motion is final order appealable under 28 U.S.C. 1291).

c. Coffman's estate opposed both the government's reimbursement claim and Green's negligence claim by asserting the defense of intramilitary immunity, which immunizes the government from liability under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres* v. *United States*, 340 U.S. 135, 146 (1950). The Ninth Circuit has extended the doctrine to suits between individual servicemembers for injuries incident to service. See, *e.g.*, *Lutz* v. *Secretary of the Air Force*, 944 F.2d 1477, 1480-1481 (9th Cir. 1991); *Johnson* v. *United States*, 704 F.2d 1431 (9th Cir. 1983). Coffman's estate moved for a separate trial on its immunity defense, which the magistrate judge construed (with the parties' consent) as a motion for summary judgment. Pet. App. A34.

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so, it has "a right to recover" the "reasonable value" of that care from the person whose negligence caused the injury.

The magistrate judge, in a report adopted by the district court, rejected the immunity defense asserted by Coffman's estate. Pet. App. A28-A38. He determined that, "[f]rom the evidence in the record, a trier of fact could conclude only that [Green] and Coffman were engaged in 'distinctly nonmilitary acts' when the accident occurred." *Id.* at A37. He explained (*ibid.*):

> The evidence does not support the conclusion that [Green] and Coffman were acting under any military orders or directions at the time of the accident. The alleged negligent act in question occurred off-post, while [Green] and Coffman were on their own time, performing acts of their own choosing, not acts which they had received military instructions to perform. The accident occurred while [Green] and Coffman were riding in a private vehicle, not long before they were due to attend the first formation.

The magistrate judge did not accept the assertion of Coffman's estate that one purpose of the drive was to pick up training materials at Green's house. He noted that Coffman and Green were "not traveling on a route that would have led them most directly to Green's house," and that "[n]o training materials were found in Coffman's automobile." *Ibid.* The magistrate decided that "[i]n the absence of facts from which a trier of fact could conclude that [Green] and Coffman were acting 'incident to military service,' " Green and the government were entitled to summary judgment on the defense of intramilitary immunity asserted by Coffman's estate. *Id.* at A38.

3. The Ninth Circuit affirmed the denial of the estate's motion for certification and the rejection of the estate's defense of intramilitary immunity. Pet. App. A39-A50. The Ninth Circuit held that it was "not clearly erroneous" for the magistrate (and, by adoption, the district court) to

find that Coffman and Green did not leave the base to get training materials. *Id.* at A48. The Ninth Circuit determined that the evidence before the magistrate judge "suggest[s] that the two Reservists could have intended to pick up training materials, but [it] equally support[s] the conclusion that the Reservists were after doughnuts or just breakfast." *Ibid.* The court also noted that, at the time of the accident, the two men were off-base and "had no duties." *Id.* at A48-A49.

ARGUMENT

Petitioner contends (Pet. 5-13) that the court of appeals erred in holding that the injuries sustained by petitioner's decedent were not "incident to service" for purposes of the *Feres* doctrine. That factbound holding, however, is correct and does not conflict with any decision of this Court or that of any other court of appeals.

1. Petitioner does not contend that the courts below applied an erroneous standard to the facts of this case, nor could he do so. The courts below simply applied the standard enunciated in *Feres,* which bars FTCA recovery for injuries "incident to service." 340 U.S. at 146. Moreover, petitioner does not directly challenge the finding below that, when the accident occurred, Green and Coffman were not going to get training materials. Such a challenge, in any event, would not merit further review. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Tiffany Fine Arts, Inc.* v. *United States,* 469 U.S. 310, 317 n.5 (1985).

Instead, petitioner contends that the government was precluded as a matter of law from opposing his defense of intramilitary immunity. He relies on the facts (1) that an Army investigator found that Coffman and Green were on their way to get training materials when the accident

occurred; and (2) that the Army determined that Coffman was acting "in the line of duty" for the purpose of making him eligible for various military benefits. This argument is without merit.

Certain agency proceedings "may well have preclusive effect" in later judicial proceedings. *Hayfield N.R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622, 636 n.15 (1984); see *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). Moreover, the preclusive effect of an administrative proceeding may encompass both issue preclusion and claim preclusion. See *Astoria Fed. Savings & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 106 (1991); *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 484 n.26 (1982); see also *Hayfield*, 467 U.S. at 636 n.15 (administrative claim preclusion); *University of Tennessee* v. *Elliott*, 478 U.S. 788, 797-798 (1986) (administrative issue preclusion). The action of an administrative agency has preclusive effect, however, only "[w]hen [the] * * * agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Utah Constr.*, 384 U.S. at 422.

Petitioner has not shown that the Army's investigation in this case satisfied the conditions for administrative preclusion. Specifically, he has not shown that the Army investigator was "acting in a judicial capacity" when he determined that petitioner's decedent was injured in the line of duty. Nor has petitioner shown that the investigation partook of an adversary proceeding in which parties disputed whether the injuries were sustained in the line of duty.[4] Because petitioner did not show that the Army in-

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[4] In particular, the government was not in the position of a litigant with an opportunity to challenge the investigator's finding that Coffman and Green were on their way to get training materials when the

vestigation had "the adversariness and adequacy of administrative proceedings" necessary for preclusive effect, it did not bar the government from opposing petitioner's immunity defense. See *Nasem* v. *Brown*, 595 F.2d 801, 806 (D.C. Cir. 1979).

Moreover, the Army's determination that the injuries of petitioner's decedent were sustained in the "line of duty" (Pet. App. A61-A65) was not tantamount to a determination that the injuries were "incident to service" for purposes of *Feres*. As petitioner concedes (Pet. 7), the relevance of a line-of-duty determination is in determining a servicemember's entitlement to military benefits. That function is reflected in the line-of-duty regulation, which states that "a person stands to lose substantial benefits as a consequence of his or her actions." Army Reg. 600-8-1 § 39-1, *reprinted at* Pet. App. A59. That function is also reflected in the line-of-duty inquiry, which primarily focuses on whether a servicemember should be barred from receiving benefits because of his or her "intentional misconduct or willful negligence." *Ibid.* ("A person who becomes a casualty because of his or her intentional misconduct or willful negligence can never be said to be injured, diseased, or deceased in the line of duty."); *id.* § 39-2 ("Line of duty investigations are conducted essentially to arrive at a determination as to whether misconduct or negligence was involved."), *reprinted at* Pet. App. A59.

The purpose of the *Feres* doctrine and the focus of an inquiry as to its applicability differ significantly from those of a line-of-duty determination. See generally *Feres*, 340 U.S. at 142-146; see also *United States* v. *Johnson*, 481 U.S. 681, 688-691 (1987); *United States* v. *Shearer*,

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accident occurred. Thus, that finding did not bar the government in this case from litigating the issue of the purpose of the two men's trip.

473 U.S. 52, 57-59 (1985). The lower courts accordingly have recognized that a servicemember may not have been acting "incident to service" even though he or she was acting "in the line of duty," and vice-versa. See *Lauer* v. *United States*, 968 F.2d 1428, 1429-1430 (1st Cir.) (*Feres* barred servicemember's suit against the government for injuries he sustained from a car that hit him when he was walking down a Navy-maintained road, returning to base from liberty; injuries were "incident to service," notwithstanding Navy's determination that they were not "in the line of duty"), cert. denied, 113 S. Ct. 812 (1992); *Parker* v. *United States*, 611 F.2d 1007, 1008, 1011-1012 & n.6 (5th Cir. 1980) ("an off-duty serviceman on a four-day 'furlough' proceeding on a roadway within a military reservation to his off-base home" was not "acting incident to his military service," even though his injuries were sustained "in the line of duty" for purposes of statutory benefits). Those decisions support the Ninth Circuit's conclusion in this case that "[t]he Army's administrative finding that Coffman was acting in the 'line of duty' the morning of the accident is irrelevant since i[t] addresses whether Coffman was engaged in misconduct and his eligibility for medical benefits." Pet. App. A48 n.7; cf. *Kremer*, 456 U.S. at 479.[5]

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[5] Some courts have stated in dictum that the "incident to service" standard is broader than the "line of duty" standard. See, *e.g.*, *Lauer*, 968 F.2d at 1429; *Hale* v. *United States*, 416 F.2d 355, 358 (6th Cir. 1969); *United States* v. *Carroll*, 369 F.2d 618, 622 (8th Cir. 1966). Those statements suggest that an injury sustained in the "line of duty" is necessarily sustained "incident to service." The courts have made such statements to explain why an injury in a particular case may have occurred "incident to service"—and why compensation in a tort suit based on that injury is consequently barred under the *Feres* doctrine—even though the injury is not compensable as having occurred in the "line of duty." As discussed in the text, a more accurate explanation

2. Petitioner contends (Pet. 5, 7, 12) that the government cannot seek reimbursement under 42 U.S.C. 2651 for the medical care of a servicemember for injuries "incident to service." The court of appeals did not address that contention in light of its holding that the injuries of petitioner's decedent and Green were not "incident to service." Because that holding is correct, further review of petitioner's contention is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1994

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for such a result is that the "incident to service" and "line of duty" determinations are made in different contexts and based on different considerations so that, although there may be overlap in the coverage of the doctrines, they are not congruent and each covers some activities that the other does not.

(5)

No. 93-1776

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1994

GORDON L. HALL, et al.,
Petitioners,

v.

VAL JOHN GREEN,
Respondent.

and

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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August 29, 1994

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PETITIONERS' REPLY

The government in its brief argues that the "incident to service" test under *Feres v. United States*, 340 U.S. 135 (1950), is different than the "line of duty" determination under military regulations. However, the government has failed to point out that when it is *defending* actions for military-related injuries, it consistently takes the position that the "incident to service" test is broader than the "line of duty" determination. That was the government's position in *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980), which the government relies upon in its opposition to the certiorari petition, and that has been its position in many other cases. *See Lauer v. United States*, 968 F.2d 1428 (1st Cir. 1992); *Hale v. United States*, 416 F.2d 355 (6th Cir. 1969); *United States v. Carroll*, 369 F.2d 618, 622 (8th Cir. 1966).

That position is both logical and correct because anyone who is injured in the "line of duty" must, by definition, have been in a status, at the time of the injury, that was "incident to service." Thus, if a soldier is injured in the "line of duty," the factors that are the basis for the *Feres* doctrine are necessarily present: receipt of compensation benefits, military status at the time of injury, and the distinctive federal character of the military relationship. *United States v. Johnson*, 481 U.S. 681 (1987).

In this case, however, the government has abandoned that position. It is now asserting claims as a plaintiff, seeking to recover under the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653, for hospital expenses paid on behalf of a soldier as the result of the alleged negligence of another soldier. In its present posture as plaintiff, the government takes the position that even though a solider was injured in the "line of duty," his status at the time was not "incident to service."

The government should not be allowed to have it both ways. The same rule should apply to the government whether it is the defendant or the plaintiff in an action. Because there is no

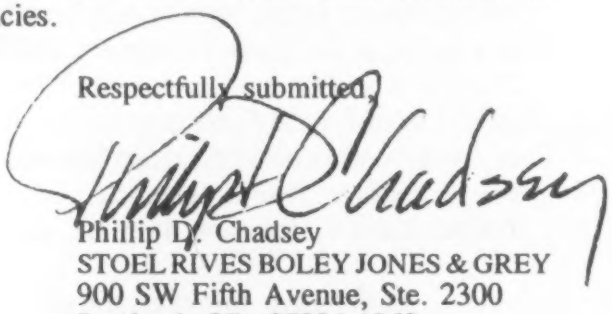
dispute that plaintiff Green was injured while in the "line of duty," the government's claim should be barred by the *Feres* doctrine.

If the government now wants to limit the scope of the *Feres* doctrine by eliminating it as a defense to a claim by the government under the Federal Medical Care Recovery Act, then this Court should grant certiorari. Plaintiff has suggested that the doctrine be abandoned entirely. That would certainly be a better policy than permitting it to be invoked as a defense *by* the government but not as a defense *against* the government.

CONCLUSION

Both the government and the various circuits have taken inconsistent positions on the application of the *Feres* doctrine and on the relationship between the "line of duty" and "incident to service" determinations. This Court should grant certiorari to resolve the inconsistencies.

Respectfully submitted,



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